APPENDIX
Additional Guidelines Or Suggested Practices

PART I: Introduction; Uniform Training Plan; Multidisciplinary Teams

FEDERAL INDIAN CHILD WELFARE ACT (ICWA)

A. PUBLIC LAW 95-608, INDIAN CHILD WELFARE ACT OF 1978

1.0 Background

Under this Federal Act, passed in 1968, Indian Tribes were granted extensive jurisdiction in child welfare cases involving Indian children, recognizing "that there is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children."

2.0 Purpose

The ICWA was enacted to prevent the continued removal by state agencies, courts and private agencies of large numbers of Indian children from their families and their culture.

2.1 Overview

The Act "established minimum standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."

3.0 Applicable Children

These are all children who have Native American or Alaskan Eskimo, or Aleut heritage of a federally recognized tribe. Federally recognized tribes are listed each year in the Federal Register. Because Virginia has no federally recognized tribes, a child belonging to a Virginia tribe is not currently subject to the Indian Child Welfare Act.

4.0 Responsibilities of Local Department Workers

If such a child belongs to a tribe located outside Virginia, does not live on a recognized reservation (there are no federally recognized tribal reservations in Virginia), and is in imminent danger, the child protective service worker has the authority to exercise summary removal.

a. A local department may temporarily place a child.

b. The local department shall immediately contact the Child Protective Services Unit in the Family Services Division, VDSS Central Office,

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Richmond (804-692-1259) before taking any action to place one of these children, other than temporarily.

c. The Child Protective Services Unit shall contact the Bureau of Indian Affairs (Evelyn Roan-Horse or Larry Black at 703-235-2353) on behalf of the local department to determine which tribe, if any, will take jurisdiction of the child, and how this shall occur.

5.0 ICWA Applies to Four Types of Custody Proceedings

The ICWA applies to four types of Indian child custody proceedings, to include foster care placements, termination of certain parental rights, pre-adoption placements, and adoption placements.

6.0 Placing Indian Child in Foster Care

According to the ICWA, when an Indian child is placed in foster care, the placement agency or party must place the child (in the absence of good cause to deviate) with

a. A member of the Indian child's extended family (including non-Indian members of the family);

b. A foster home licensed or approved by the child's tribe;

c. An Indian foster home licensed or approved by a non-Indian agency or authority; or

d. An institution for children that has the approval of an Indian tribe.

7.0 Indian Tribal Courts Maintain Exclusive Jurisdiction over Indian Children Living on Reservations

The ICWA vests Indian tribal courts with exclusive jurisdiction over Indian Children who live on federally recognized Indian reservations.

B. VIRGINIA TRIBES (NOT SUBJECT TO ICWA)

1.0 Treaty of 1677

Virginia tribes are organized as chartered corporations and their recognition from the state dates to their treaty with the Colony of Virginia in 1677. These tribes are eligible for federal recognition, and it is expected that federal recognition may be granted.

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2.0 Federal Funding for Virginia Tribes

Virginia tribes do benefit from federal funds for education and community development the same as do federally recognized tribes.

3.0 Specific Virginia Tribes Recognized by the Commonwealth of Virginia

Virginia tribes include the Chickahominy, Eastern Chickahominy, Mattaponi, Monacan, Nansemond, Pamunkey, Rappahannock, and Upper Mattaponi.

NON-DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN: INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY (LEP)

I. PURPOSE

The purpose of this policy is to ensure that limited-English-proficient individuals have meaningful access to program information and services in accordance with Title VI of the Civil Rights Act of 1964. All DSS agencies must take adequate steps to ensure that LEP individuals receive the language assistance necessary to allow them meaningful access to programs and services, free-of -charge.

II. DEFINITIONS

A. LIMITED-ENGLISH-PROFICIENT INDIVIDUAL – A limited-English-proficient (LEP) individual is a person whose primary language is not English and who cannot speak, read, write or understand the English language at a level that permits him to interact effectively with social services agencies.

B. MEANINGFUL ACCESS – Meaningful access to programs and services is the standard of access to comply with Title VI's language access requirements. To ensure meaningful access for limited-English-proficient individuals, service providers must make available to applicant/recipients free language assistance those results in accurate and effective communication.

Awareness of services provided and rights of service recipients are important parts of "meaningful access."

III. MEANINGFUL ACCESS

A. MEANINGFUL ACCESS FOR LEP INDIVIDUALS – No person will be denied access to program information because s/he does not speak or has limited proficiency in English. All staff, including contractors, will provide for effective communication between LEP individuals and staff by providing appropriate language assistance services when LEP individuals require these services. Staff will provide LEP individuals with meaningful access to programs and services in a timely manner and at no cost to the client.

Staff must ensure that the LEP individual is given adequate and accurate information, is able to understand the services and benefits available, and is able to receive those services and benefits for which s/he is eligible. In addition, staff must ensure that the LEP person can effectively communicate the relevant circumstances of their situation to staff.

Outreach should be conducted with appropriate community organizations to inform LEP individuals of important services and benefits available to them.

B. AFFIRMATIVE OFFER OF LANGUAGE ASSISTANCE – Staff will offer language assistance to clients who have difficulty communicating in English. Clients who request language assistance must be offered free interpretation and/or translation services in a language they understand, in a way that ensures meaningful access, preserves confidentiality, and in a timely manner. Whenever possible, staff are encouraged to follow a client's preferences. (See Section V.)

C. DOCUMENTATION AND SHARING OF INFORMATION – Each agency shall ensure that case record documentation identifies the client's primary language. If one component of DSS determines that an individual has limited English proficiency that may impact his/her ability to meet program requirements and procedures, then the staff must share that information with other staff that may interact with the individual.

D. COMPETENCY OF INTERPRETERS – Interpreters must be competent. "Competency" requires that interpreters have demonstrated proficiency in both English and the intended language; fundamental knowledge in both languages and any specialized terms or concepts; an understanding of confidentiality and impartiality; an understanding of the role of interpreter and the ability to act as such without deviating into other roles such as counselor or legal advisor; and sensitivity to the client's culture. Interpreters shall disclose any real or perceived conflict of interest.

E. TRANSLATION OF WRITTEN MATERIALS – If an office regularly encounters certain languages other than English, then it is important to ensure that vital documents be translated into the non-English language of each regularly encountered LEP group eligible to be served or likely to be directly affected following federal guidelines. Examples of vital documents include applications, consent forms, letters containing important information regarding participation in the program, notices pertaining to the reduction, denial or termination of benefits or the imposition of a sanction, the right to appeal such actions or that require a response from the recipients, notices of actions regarding parental custody or child support or other hearings, notices advising LEP persons of the availability of free language assistance, and other outreach materials. It is the responsibility of the Virginia Department of Social Services to provide translated forms when required.

In providing outreach to LEP persons, pamphlets advising them of program or service availability should be provided in appropriate languages.

F. EXAMPLES OF SITUATIONS WHERE MEANINGFUL ACCESS STANDARD IS NOT SATISFIED

1. A local office uses a Vietnamese janitor to interpret whenever Vietnamese applicants or recipients seek services. The janitor has been in the U.S. for six months, does not speak English well, and is not familiar with the terminology that is used. He may relay inaccurate information that results in the denial of benefits to clients.

2. A local office does not advise a mother of her right to free

language assistance and encourages her to use her eleven-year-old daughter to interpret for her. The daughter may not understand the terminology being used and may relay inaccurate information to her mother whose benefits are jeopardized by the failure to obtain accurate information.

3. A local office uses a college student as an interpreter based on her self-identification as bilingual. While in college, the student spent a semester in Spain as an exchange student. The student speaks Spanish haltingly and must often ask LEP individuals to speak slowly and to repeat their statements.

IV. INTERPRETER RESOURCES

As much as possible, staff should use interpreter services as follows:

A. BILINGUAL STAFF and STAFF INTERPRETERS – Agencies should use their best efforts to assign clients with LEP to bilingual staff that speak their language and can provide competent interpretation services.

B. CONTRACT INTERPRETATION SERVICES – In order to provide interpretation services during business hours and for written document translation needs, contractual arrangements should be made for competent interpreters.

C. TELEPHONE INTERPRETER SERVICES

D. COMMUNITY VOLUNTEERS – Community volunteers must be competent and must be knowledgeable of confidentiality and impartiality regulations. Formal agreements with community based organizations are encouraged to ensure the caliber and availability of services.

V. USE OF FAMILY MEMBERS, FRIENDS, AND MINOR CHILDREN

Staff will not require, suggest or encourage an LEP individual to use friends, children, or family members as interpreters. Family and friends usually are not competent to act as interpreters, since they are often insufficiently proficient in both languages, unskilled in interpretation, and unfamiliar with DSS terminology. Use of such persons could result in a breach of confidentiality or reluctance on the part of individuals to reveal personal information that is important for staff to know.

After staff has informed the LEP individual of the right to free interpreter services and the person declines the services and requests the use of a family member or friend, then the staff may use the family member or friend, if they will not compromise the effectiveness of the staff's work or services or violate the LEP individual's confidentiality. The LEP individual shall sign a waiver indicating the agency has offered an interpreter, but that s/he has declined. The agency should record the offer of LEP services in the individual's file and the fact that the individual declined the service. If an LEP individual elects to use a family member or friend, staff should suggest that a trained interpreter sit in on the encounter to ensure accurate interpretation.

In the case of administrative hearings, adult or child protective services or any situations in which health, safety, or benefits are at stake, the agency may decide to provide its own interpreter in addition to one selected by the LEP to ensure precise, complete, and accurate translations of information and/or testimony and the continued health and safety of the client.

Code of Virginia

§ 63.2-1500.

Not set out. (Acts 2002, c. 747.)

§ 63.2-1501. Definitions.

As used in this chapter unless the context requires a different meaning:

"Court" means the juvenile and domestic relations district court of the county or city.

"Prevention" means efforts that (i) promote health and competence in people and (ii) create, promote and strengthen environments that nurture people in their development.

(1975, c. 341, § 63.1-248.2; 1981, c. 123; 1986, c. 308; 1990, c. 760; 1995, c. 520; 2000, c. 500; 2002, c. 747.)

§ 63.2-1502. Establishment of Child-Protective Services Unit; duties.

There is created a Child-Protective Services Unit in the Department that shall have the following powers and duties:

1. To evaluate and strengthen all local, regional and state programs dealing with child abuse and neglect.

2. To assume primary responsibility for directing the planning and funding of child-protective services. This shall include reviewing and approving the annual proposed plans and budgets for protective services submitted by the local departments.

3. To assist in developing programs aimed at discovering and preventing the many factors causing child abuse and neglect.

4. To prepare and disseminate, including the presentation of, educational programs and materials on child abuse and neglect.

5. To provide educational programs for professionals required by law to make reports under this chapter.

6. To establish standards of training and provide educational programs to qualify workers in the field of child-protective services. Such standards of training shall include provisions regarding the legal duties of the workers in order to protect the constitutional and statutory rights and safety of children and families from the initial time of contact during investigation through treatment.

7. To establish standards of training and educational programs to qualify workers to determine whether complaints of abuse or neglect of a child in a private or state-operated hospital, institution or other facility, or public school, are founded.

8. To maintain staff qualified pursuant to Board regulations to assist local department personnel in determining whether an employee of a private or state-operated hospital, institution or other facility or an employee of a school board, abused or neglected a child in such hospital, institution, or other facility, or public school.

9. To monitor the processing and determination of cases where an employee of a private or state-operated hospital, institution or other facility, or an employee of a school board, is suspected of abusing or neglecting a child in such hospital, institution, or other facility, or public school.

10. To help coordinate child-protective services at the state, regional, and local levels with the efforts of other state and voluntary social, medical and legal agencies.

11. To maintain a child abuse and neglect information system that includes all cases of child abuse and neglect within the Commonwealth.

12. To provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, and his parents or guardians.

13. To establish minimum training requirements for workers and supervisors on family abuse and domestic violence, including the relationship between domestic violence and child abuse and neglect.

(1975, c. 341, § 63.1-248.7; 1984, c. 734; 1993, c. 955; 2000, c. 500; 2002, c. 747; 2004, cc. 93, 233, 972, 980.)

§ 63.2-1503. Local departments to establish child-protective services; duties.

A. Each local department shall establish child-protective services under a departmental coordinator within such department or with one or more adjacent local departments that shall be staffed with qualified personnel pursuant to regulations adopted by the Board. The local department shall be the public agency responsible for receiving and responding to complaints and reports, except that (i) in cases where the reports or complaints are to be made to the court and the judge determines that no local department within a reasonable geographic distance can impartially respond to the report, the court shall assign the report to the court services unit for evaluation; and (ii) in cases where an employee at a private or state-operated hospital, institution or other facility, or an employee of a school board is suspected of abusing or neglecting a child in such hospital, institution or other facility, or public school, the local department shall request the Department and the relevant private or state-operated hospital, institution or other facility, or school board to assist in conducting a joint investigation in accordance with regulations adopted by the Board, in consultation with the Departments of Education, Health, Medical Assistance Services, Mental Health, Mental Retardation and Substance Abuse Services, Juvenile Justice and Corrections.

B. The local department shall ensure, through its own personnel or through cooperative arrangements with other local agencies, the capability of receiving reports or complaints and responding to them promptly on a 24-hours-a-day, seven-days-per-week basis.

C. The local department shall widely publicize a telephone number for receiving complaints and reports.

D. The local department shall upon receipt of a complaint, report immediately to the attorney for the Commonwealth and the local law-enforcement agency and make available to them the records of the local department when abuse or neglect is suspected in any case involving (i) death of a child; (ii) injury or threatened injury to the child in which a felony or Class 1 misdemeanor is also suspected; (iii) any sexual abuse, suspected sexual abuse or other sexual offense involving a child, including but not limited to the use or display of the child in sexually explicit visual material, as defined in § 18.2-374.1; (iv) any abduction of a child; (v) any felony or Class 1 misdemeanor drug offense involving a child; or (vi) contributing to the delinquency of a minor in violation of § 18.2-371, and provide the attorney for the Commonwealth and the local law-enforcement agency with records of any complaints of abuse or neglect involving the victim or the alleged perpetrator. The local department shall not allow reports of the death of the victim from other local agencies to substitute for direct reports to the attorney for the Commonwealth and the local law-enforcement agency. The local department shall develop, when practicable, memoranda of understanding for responding to reports of child abuse and neglect with local law enforcement and the attorney for the Commonwealth.

E. When abuse or neglect is suspected in any case involving the death of a child, the local department shall report the case immediately to the regional medical examiner and the local law-enforcement agency.

F. The local department shall use reasonable diligence to locate (i) any child for whom a report of suspected abuse or neglect has been received and is under investigation, receiving family assessment, or for whom a founded determination of abuse and neglect has been made and a child-protective services case opened and (ii) persons who are the subject of a report that is under investigation or receiving family assessment, if the whereabouts of the child or such persons are unknown to the local department.

G. When an abused or neglected child and the persons who are the subject of an open child-protective services case have relocated out of the jurisdiction of the local department, the local department shall notify the child-protective services agency in the jurisdiction to which such persons have relocated, whether inside or outside of the Commonwealth, and forward to such agency relevant portions of the case record. The receiving local department shall arrange protective and rehabilitative services as required by this section.

H. When a child for whom a report of suspected abuse or neglect has been received and is under investigation or receiving family assessment and the child and the child's parents or

other persons responsible for the child's care who are the subject of the report that is under investigation or family assessment have relocated out of the jurisdiction of the local department, the local department shall notify the child-protective services agency in the jurisdiction to which the child and such persons have relocated, whether inside or outside of the Commonwealth, and complete such investigation or family assessment by requesting such agency's assistance in completing the investigation or family assessment. The local department that completes the investigation or family assessment shall forward to the receiving agency relevant portions of the case record in order for the receiving agency to arrange protective and rehabilitative services as required by this section.

I. Upon receipt of a report of child abuse or neglect, the local department shall determine the validity of such report and shall make a determination to conduct an investigation pursuant to § 63.2-1505 or, if designated as a child-protective services differential response agency by the Department according to § 63.2-1504, a family assessment pursuant to § 63.2-1506.

J. The local department shall foster, when practicable, the creation, maintenance and coordination of hospital and community-based multidisciplinary teams that shall include where possible, but not be limited to, members of the medical, mental health, social work, nursing, education, legal and law-enforcement professions. Such teams shall assist the local departments in identifying abused and neglected children; coordinating medical, social, and legal services for the children and their families; developing innovative programs for detection and prevention of child abuse; promoting community concern and action in the area of child abuse and neglect; and disseminating information to the general public with respect to the problem of child abuse and neglect and the facilities and prevention and treatment methods available to combat child abuse and neglect. These teams may be the family assessment and planning teams established pursuant to § 2.2-5207. Multidisciplinary teams may develop agreements regarding the exchange of information among the parties for the purposes of the investigation and disposition of complaints of child abuse and neglect, delivery of services and child protection. Any information exchanged in accordance with the agreement shall not be considered to be a violation of the provisions of § 63.2-102, 63.2-104, or 63.2-105.

The local department shall also coordinate its efforts in the provision of these services for abused and neglected children with the judge and staff of the court.

K. The local department may develop multidisciplinary teams to provide consultation to the local department during the investigation of selected cases involving child abuse or neglect, and to make recommendations regarding the prosecution of such cases. These teams may include, but are not limited to, members of the medical, mental health, legal and law-enforcement professions, including the attorney for the Commonwealth or his designee; a local child-protective services representative; and the guardian ad litem or other court-appointed advocate for the child. Any information exchanged for the purpose of such consultation shall not be considered a violation of § 63.2-102, 63.2-104, or 63.2-105.

L. The local department shall report annually on its activities concerning abused and neglected children to the court and to the Child-Protective Services Unit in the Department on forms provided by the Department.

M. Statements, or any evidence derived therefrom, made to local department child-protective services personnel, or to any person performing the duties of such personnel, by any person accused of the abuse, injury, neglect or death of a child after the arrest of such person, shall not be used in evidence in the case-in-chief against such person in the criminal proceeding on the question of guilt or innocence over the objection of the accused, unless the statement was made after such person was fully advised (i) of his right to remain silent, (ii) that anything he says may be used against him in a court of law, (iii) that he has a right to the presence of an attorney during any interviews, and (iv) that if he cannot afford an attorney, one will be appointed for him prior to any questioning.

N. Notwithstanding any other provision of law, the local department, in accordance with Board regulations, shall transmit information regarding founded complaints or family assessments and may transmit other information regarding reports, complaints, family assessments and investigations involving active duty military personnel or members of their household to family advocacy representatives of the United States Armed Forces.

O. The local department shall notify the custodial parent and make reasonable efforts to notify the noncustodial parent as those terms are defined in § 63.2-1900 of a report of suspected abuse or neglect of a child who is the subject of an investigation or is receiving family assessment, in those cases in which such custodial or noncustodial parent is not the subject of the investigation.

P. The local department shall notify the Superintendent of Public Instruction when an individual holding a license issued by the Board of Education is the subject of a founded complaint of child abuse or neglect and shall transmit identifying information regarding such individual if the local department knows the person holds a license issued by the Board of Education and after all rights to any appeal provided by § 63.2-1526 have been exhausted. Any information exchanged for the purpose of this subsection shall not be considered a violation of § 63.2-102, 63.2-104, or 63.2-105.

(1975, c. 341, § 63.1-248.6; 1978, c. 747; 1979, cc. 347, 348; 1984, c. 392; 1987, c. 443; 1989, cc. 109, 547; 1991, c. 644; 1992, cc. 214, 837, 880; 1993, cc. 506, 955; 1994, cc. 643, 675, 840; 1996, cc. 858, 863; 1998, cc. 704, 716; 2000, cc. 500, 854; 2002, c. 747; 2004, cc. 114, 220, 886; 2008, cc. 474, 827.)

§ 63.2-1504. Child-protective services differential response system.

The Department shall implement a child-protective services differential response system in all local departments. The differential response system allows local departments to respond to valid reports or complaints of child abuse or neglect by conducting either an investigation or a family assessment. The Department shall publish a plan to implement the child-protective services differential response system in local departments by July 1,

2000, and complete implementation in all local departments by July 1, 2003. The Department shall develop a training program for all staff persons involved in the differential response system, and all such staff shall receive this training.

(2000, c. 500, § 63.1-248.2:1; 2002, c. 747.)

§ 63.2-1505. Investigations by local departments.

A. An investigation requires the collection of information necessary to determine:

1. The immediate safety needs of the child;

2. The protective and rehabilitative services needs of the child and family that will deter abuse or neglect;

3. Risk of future harm to the child;

4. Alternative plans for the child's safety if protective and rehabilitative services are indicated and the family is unable or unwilling to participate in services;

5. Whether abuse or neglect has occurred;

6. If abuse or neglect has occurred, who abused or neglected the child; and

7. A finding of either founded or unfounded based on the facts collected during the investigation.

B. If the local department responds to the report or complaint by conducting an investigation, the local department shall:

1. Make immediate investigation and, if the report or complaint was based upon one of the factors specified in subsection B of § 63.2-1509, the local department may file a petition pursuant to § 16.1-241.3;

2. Complete a report and transmit it forthwith to the Department, except that no such report shall be transmitted in cases in which the cause to suspect abuse or neglect is one of the factors specified in subsection B of § 63.2-1509 and the mother sought substance abuse counseling or treatment prior to the child's birth;

3. Consult with the family to arrange for necessary protective and rehabilitative services to be provided to the child and his family;

4. Petition the court for services deemed necessary including, but not limited to, removal of the child or his siblings from their home;

5. Determine within 45 days if a report of abuse or neglect is founded or unfounded and transmit a report to such effect to the Department and to the person who is the subject of the investigation. However, upon written justification by the local department, such determination may be extended, not to exceed a total of 60 days. If through the exercise of reasonable diligence the local department is unable to find the child who is the subject of the report, the time the child cannot be found shall not be computed as part of the 45-day or 60-day period and documentation of such reasonable diligence shall be placed in the record;

6. If a report of abuse or neglect is unfounded, transmit a report to such effect to the complainant and parent or guardian and the person responsible for the care of the child in those cases where such person was suspected of abuse or neglect; and

7. If a report of child abuse and neglect is founded, and the subject of the report is a full-time, part-time, permanent, or temporary teacher in a school division located within the Commonwealth, notify the relevant school board of the founded complaint. Any information exchanged for the purposes of this subsection shall not be considered a violation of § 63.2-102, 63.2-104 or 63.2-105.

C. Each local board may obtain and consider, in accordance with regulations adopted by the Board, statewide criminal history record information from the Central Criminal Records Exchange and results of a search of the child abuse and neglect central registry of any individual who is the subject of a child abuse or neglect investigation conducted under this section when there is evidence of child abuse or neglect and the local board is evaluating the safety of the home and whether removal will protect a child from harm. The local board also may obtain such a criminal records or registry search on all adult household members residing in the home where the individual who is the subject of the investigation resides and the child resides or visits. If a child abuse or neglect petition is filed in connection with such removal, a court may admit such information as evidence. Where the individual who is the subject of such information contests its accuracy through testimony under oath in hearing before the court, no court shall receive or consider the contested criminal history record information without certified copies of conviction. Further dissemination of the information provided to the local board is prohibited, except as authorized by law.

(2000, c. 500, § 63.1-248.6:01; 2002, c. 747; 2007, c. 495; 2008, c. 555.)

§ 63.2-1506. Family assessments by local departments.

A. A family assessment requires the collection of information necessary to determine:

1. The immediate safety needs of the child;

2. The protective and rehabilitative services needs of the child and family that will deter abuse or neglect;

3. Risk of future harm to the child; and

4. Alternative plans for the child's safety if protective and rehabilitative services are indicated and the family is unable or unwilling to participate in services.

B. When a local department has been designated as a child-protective services differential response system participant by the Department pursuant to § 63.2-1504 and responds to the report or complaint by conducting a family assessment, the local department shall:

1. Conduct an immediate family assessment and, if the report or complaint was based upon one of the factors specified in subsection B of § 63.2-1509, the local department may file a petition pursuant to § 16.1-241.3;

2. Immediately contact the subject of the report and the family of the child alleged to have been abused or neglected and give each a written and an oral explanation of the family assessment procedure. The family assessment shall be in writing and shall be completed in accordance with Board regulation;

3. Complete the family assessment within forty-five days and transmit a report to such effect to the Department and to the person who is the subject of the family assessment. However, upon written justification by the local department, the family assessment may be extended, not to exceed a total of sixty days;

4. Consult with the family to arrange for necessary protective and rehabilitative services to be provided to the child and his family. Families have the option of declining the services offered as a result of the family assessment. If the family declines the services, the case shall be closed unless the local department determines that sufficient cause exists to redetermine the case as one that needs to be investigated. In no instance shall a case be redetermined as an investigation solely because the family declines services;

5. Petition the court for services deemed necessary;

6. Make no disposition of founded or unfounded for reports in which a family assessment is completed. Reports in which a family assessment is completed shall not be entered into the central registry contained in § 63.2-1515; and

7. Commence an immediate investigation, if at any time during the completion of the family assessment, the local department determines that an investigation is required.

C. When a local department has been designated as a child-protective services differential response agency by the Department, the local department may investigate any report of child abuse or neglect, but the following valid reports of child abuse or neglect shall be investigated: (i) sexual abuse, (ii) child fatality, (iii) abuse or neglect resulting in serious injury as defined in § 18.2-371.1, (iv) child has been taken into the custody of the local department, or (v) cases involving a caretaker at a state-licensed child day center,

religiously exempt child day center, licensed, registered or approved family day home, private or public school, hospital or any institution.

(2000, c. 500, § 63.1-248.6:02; 2002, cc. 641, 642, 747.)

§ 63.2-1507. Cooperation by state entities.

All law-enforcement departments and other state and local departments, agencies, authorities and institutions shall cooperate with each child-protective services coordinator of a local department and any multi-discipline teams in the detection and prevention of child abuse.

(1975, c. 341, § 63.1-248.17; 2002, c. 747.)

§ 63.2-1508. Valid report or complaint.

A valid report or complaint means the local department has evaluated the information and allegations of the report or complaint and determined that the local department shall conduct an investigation or family assessment because the following elements are present:

1. The alleged victim child or children are under the age of eighteen at the time of the complaint or report;

2. The alleged abuser is the alleged victim child's parent or other caretaker;

3. The local department receiving the complaint or report has jurisdiction; and

4. The circumstances described allege suspected child abuse or neglect.

Nothing in this section shall relieve any person specified in § 63.2-1509 from making a report required by that section, regardless of the identity of the person suspected to have caused such abuse or neglect.

(1975, c. 341, § 63.1-248.2; 1981, c. 123; 1986, c. 308; 1990, c. 760; 1995, c. 520; 2000, c. 500; 2002, c. 747.)

§ 63.2-1509. (Effective until March 31, 2009) Physicians, nurses, teachers, etc., to report certain injuries to children; penalty for failure to report.

A. The following persons who, in their professional or official capacity, have reason to suspect that a child is an abused or neglected child, shall report the matter immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline:

1. Any person licensed to practice medicine or any of the healing arts;

2. Any hospital resident or intern, and any person employed in the nursing profession;

3. Any person employed as a social worker;

4. Any probation officer;

5. Any teacher or other person employed in a public or private school, kindergarten or nursery school;

6. Any person providing full-time or part-time child care for pay on a regularly planned basis;

7. Any mental health professional;

8. Any law-enforcement officer or animal control officer;

9. Any mediator eligible to receive court referrals pursuant to § 8.01-576.8;

10. Any professional staff person, not previously enumerated, employed by a private or state-operated hospital, institution or facility to which children have been committed or where children have been placed for care and treatment;

11. Any person associated with or employed by any private organization responsible for the care, custody or control of children;

12. Any person who is designated a court-appointed special advocate pursuant to Article 5 (§ 9.1-151 et seq.) of Chapter 1 of Title 9.1;

13. Any person, over the age of 18 years, who has received training approved by the Department of Social Services for the purposes of recognizing and reporting child abuse and neglect; and

14. Any person employed by a local department as defined in § 63.2-100 who determines eligibility for public assistance.

This subsection shall not apply to any regular minister, priest, rabbi, imam, or duly accredited practitioner of any religious organization or denomination usually referred to as a church as it relates to (i) information required by the doctrine of the religious organization or denomination to be kept in a confidential manner or (ii) information that would be subject to § 8.01-400 or 19.2-271.3 if offered as evidence in court.

If neither the locality in which the child resides nor where the abuse or neglect is believed to have occurred is known, then such report shall be made to the local department of the

county or city where the abuse or neglect was discovered or to the Department's toll-free child abuse and neglect hotline.

If an employee of the local department is suspected of abusing or neglecting a child, the report shall be made to the court of the county or city where the abuse or neglect was discovered. Upon receipt of such a report by the court, the judge shall assign the report to a local department that is not the employer of the suspected employee for investigation or family assessment. The judge may consult with the Department in selecting a local department to respond to the report or the complaint.

If the information is received by a teacher, staff member, resident, intern or nurse in the course of professional services in a hospital, school or similar institution, such person may, in place of said report, immediately notify the person in charge of the institution or department, or his designee, who shall make such report forthwith.

The initial report may be an oral report but such report shall be reduced to writing by the child abuse coordinator of the local department on a form prescribed by the Board. Any person required to make the report pursuant to this subsection shall disclose all information that is the basis for his suspicion of abuse or neglect of the child and, upon request, shall make available to the child-protective services coordinator and the local department, which is the agency of jurisdiction, any information, records, or reports that document the basis for the report. All persons required by this subsection to report suspected abuse or neglect who maintain a record of a child who is the subject of such a report shall cooperate with the investigating agency and shall make related information, records and reports available to the investigating agency unless such disclosure violates the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g). Provision of such information, records, and reports by a health care provider shall not be prohibited by § 8.01-399. Criminal investigative reports received from law-enforcement agencies shall not be further disseminated by the investigating agency nor shall they be subject to public disclosure.

B. For purposes of subsection A, "reason to suspect that a child is abused or neglected" shall include (i) a finding made by an attending physician within seven days of a child's birth that the results of a blood or urine test conducted within 48 hours of the birth of the child indicate the presence of a controlled substance not prescribed for the mother by a physician; (ii) a finding by an attending physician made within 48 hours of a child's birth that the child was born dependent on a controlled substance which was not prescribed by a physician for the mother and has demonstrated withdrawal symptoms; (iii) a diagnosis by an attending physician made within seven days of a child's birth that the child has an illness, disease or condition which, to a reasonable degree of medical certainty, is attributable to in utero exposure to a controlled substance which was not prescribed by a physician for the mother or the child; or (iv) a diagnosis by an attending physician made within seven days of a child's birth that the child has fetal alcohol syndrome attributable to in utero exposure to alcohol. When "reason to suspect" is based upon this subsection, such fact shall be included in the report along with the facts relied upon by the person making the report.

C. Any person who makes a report or provides records or information pursuant to subsection A or who testifies in any judicial proceeding arising from such report, records, or information shall be immune from any civil or criminal liability or administrative penalty or sanction on account of such report, records, information, or testimony, unless such person acted in bad faith or with malicious purpose.

D. Any person required to file a report pursuant to this section who fails to do so within 72 hours of his first suspicion of child abuse or neglect shall be fined not more than $500 for the first failure and for any subsequent failures not less than $100 nor more than $1,000.

(1975, c. 341, § 63.1-248.3; 1976, c. 348; 1978, c. 747; 1993, c. 443; 1994, c. 840; 1995, c. 810; 1998, cc. 704, 716; 1999, c. 606; 2000, c. 500; 2001, c. 853; 2002, cc. 747, 860; 2006, cc. 530, 801; 2008, c. 43.)

§ 63.2-1509. (Effective March 31, 2009) Physicians, nurses, teachers, etc., to report certain injuries to children; penalty for failure to report.

A. The following persons who, in their professional or official capacity, have reason to suspect that a child is an abused or neglected child, shall report the matter immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline:

1. Any person licensed to practice medicine or any of the healing arts;

2. Any hospital resident or intern, and any person employed in the nursing profession;

3. Any person employed as a social worker;

4. Any probation officer;

5. Any teacher or other person employed in a public or private school, kindergarten or nursery school;

6. Any person providing full-time or part-time child care for pay on a regularly planned basis;

7. Any mental health professional;

8. Any law-enforcement officer or animal control officer;

9. Any mediator eligible to receive court referrals pursuant to § 8.01-576.8;

10. Any professional staff person, not previously enumerated, employed by a private or state-operated hospital, institution or facility to which children have been committed or where children have been placed for care and treatment;

11. Any person associated with or employed by any private organization responsible for the care, custody or control of children;

12. Any person who is designated a court-appointed special advocate pursuant to Article 5 (§ 9.1-151 et seq.) of Chapter 1 of Title 9.1;

13. Any person, over the age of 18 years, who has received training approved by the Department of Social Services for the purposes of recognizing and reporting child abuse and neglect;

14. Any person employed by a local department as defined in § 63.2-100 who determines eligibility for public assistance; and

15. Any emergency medical services personnel certified by the Board of Health pursuant to § 32.1-111.5, unless such personnel immediately reports the matter directly to the attending physician at the hospital to which the child is transported, who shall make such report forthwith.

This subsection shall not apply to any regular minister, priest, rabbi, imam, or duly accredited practitioner of any religious organization or denomination usually referred to as a church as it relates to (i) information required by the doctrine of the religious organization or denomination to be kept in a confidential manner or (ii) information that would be subject to § 8.01-400 or 19.2-271.3 if offered as evidence in court.

If neither the locality in which the child resides nor where the abuse or neglect is believed to have occurred is known, then such report shall be made to the local department of the county or city where the abuse or neglect was discovered or to the Department's toll-free child abuse and neglect hotline.

If an employee of the local department is suspected of abusing or neglecting a child, the report shall be made to the court of the county or city where the abuse or neglect was discovered. Upon receipt of such a report by the court, the judge shall assign the report to a local department that is not the employer of the suspected employee for investigation or family assessment. The judge may consult with the Department in selecting a local department to respond to the report or the complaint.

If the information is received by a teacher, staff member, resident, intern or nurse in the course of professional services in a hospital, school or similar institution, such person may, in place of said report, immediately notify the person in charge of the institution or department, or his designee, who shall make such report forthwith.

The initial report may be an oral report but such report shall be reduced to writing by the child abuse coordinator of the local department on a form prescribed by the Board. Any person required to make the report pursuant to this subsection shall disclose all information that is the basis for his suspicion of abuse or neglect of the child and, upon request, shall make available to the child-protective services coordinator and the local department, which is the agency of jurisdiction, any information, records, or reports that document the basis for the report. All persons required by this subsection to report suspected abuse or neglect who maintain a record of a child who is the subject of such a report shall cooperate with the investigating agency and shall make related information, records and reports available to the investigating agency unless such disclosure violates the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g). Provision of such information, records, and reports by a health care provider shall not be prohibited by § 8.01-399. Criminal investigative reports received from law-enforcement agencies shall not be further disseminated by the investigating agency nor shall they be subject to public disclosure.

B. For purposes of subsection A, "reason to suspect that a child is abused or neglected" shall include (i) a finding made by an attending physician within seven days of a child's birth that the results of a blood or urine test conducted within 48 hours of the birth of the child indicate the presence of a controlled substance not prescribed for the mother by a physician; (ii) a finding by an attending physician made within 48 hours of a child's birth that the child was born dependent on a controlled substance which was not prescribed by a physician for the mother and has demonstrated withdrawal symptoms; (iii) a diagnosis by an attending physician made within seven days of a child's birth that the child has an illness, disease or condition which, to a reasonable degree of medical certainty, is attributable to in utero exposure to a controlled substance which was not prescribed by a physician for the mother or the child; or (iv) a diagnosis by an attending physician made within seven days of a child's birth that the child has fetal alcohol syndrome attributable to in utero exposure to alcohol. When "reason to suspect" is based upon this subsection, such fact shall be included in the report along with the facts relied upon by the person making the report.

C. Any person who makes a report or provides records or information pursuant to subsection A or who testifies in any judicial proceeding arising from such report, records, or information shall be immune from any civil or criminal liability or administrative penalty or sanction on account of such report, records, information, or testimony, unless such person acted in bad faith or with malicious purpose.

D. Any person required to file a report pursuant to this section who fails to do so within 72 hours of his first suspicion of child abuse or neglect shall be fined not more than $500 for the first failure and for any subsequent failures not less than $100 nor more than $1,000.

(1975, c. 341, § 63.1-248.3; 1976, c. 348; 1978, c. 747; 1993, c. 443; 1994, c. 840; 1995, c. 810; 1998, cc. 704, 716; 1999, c. 606; 2000, c. 500; 2001, c. 853; 2002, cc. 747, 860; 2006, cc. 530, 801; 2008, cc. 43, 268.)

§ 63.2-1510. Complaints by others of certain injuries to children.

Any person who suspects that a child is an abused or neglected child may make a complaint concerning such child, except as hereinafter provided, to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline. If an employee of the local department is suspected of abusing or neglecting a child, the complaint shall be made to the court of the county or city where the abuse or neglect was discovered. Upon receipt of such a report by the court, the judge shall assign the report to a local department that is not the employer of the suspected employee for investigation or family assessment; or, if the judge believes that no local department in a reasonable geographic distance can be impartial in responding to the reported case, the judge shall assign the report to the court service unit of his court for evaluation. The judge may consult with the Department in selecting a local department to respond to the report or complaint. Such a complaint may be oral or in writing and shall disclose all information which is the basis for the suspicion of abuse or neglect of the child.

(1975, c. 341, § 63.1-248.4; 1976, c. 348; 1994, c. 840; 2000, c. 500; 2002, c. 747.)

§ 63.2-1511. Complaints of abuse and neglect against school personnel; interagency agreement.

A. If a teacher, principal or other person employed by a local school board or employed in a school operated by the Commonwealth is suspected of abusing or neglecting a child in the course of his educational employment, the complaint shall be investigated in accordance with §§ 63.2-1503, 63.2-1505 and 63.2-1516.1. Pursuant to § 22.1-279.1, no teacher, principal or other person employed by a school board or employed in a school operated by the Commonwealth shall subject a student to corporal punishment. However, this prohibition of corporal punishment shall not be deemed to prevent (i) the use of incidental, minor or reasonable physical contact or other actions designed to maintain order and control; (ii) the use of reasonable and necessary force to quell a disturbance or remove a student from the scene of a disturbance that threatens physical injury to persons or damage to property; (iii) the use of reasonable and necessary force to prevent a student from inflicting physical harm on himself; (iv) the use of reasonable and necessary force for self-defense or the defense of others; or (v) the use of reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or paraphernalia that are upon the person of the student or within his control. In determining whether the actions of a teacher, principal or other person employed by a school board or employed in a school operated by the Commonwealth are within the exceptions provided in this section, the local department shall examine whether the actions at the time of the event that were made by such person were reasonable.

B. For purposes of this section, "corporal punishment," "abuse," or "neglect" shall not include physical pain, injury or discomfort caused by the use of incidental, minor or reasonable physical contact or other actions designed to maintain order and control as permitted in clause (i) of subsection A or the use of reasonable and necessary force as

permitted by clauses (ii), (iii), (iv), and (v) of subsection A, or by participation in practice or competition in an interscholastic sport, or participation in physical education or an extracurricular activity.

C. If, after an investigation of a complaint under this section, the local department determines that the actions or omissions of a teacher, principal, or other person employed by a local school board or employed in a school operated by the Commonwealth were within such employee's scope of employment and were taken in good faith in the course of supervision, care, or discipline of students, then the standard in determining if a report of abuse or neglect is founded is whether such acts or omissions constituted gross negligence or willful misconduct.

D. Each local department and local school division shall adopt a written interagency agreement as a protocol for investigating child abuse and neglect reports against school personnel. The interagency agreement shall be based on recommended procedures for conducting investigations developed by the Departments of Education and Social Services.

(2001, c. 588, § 63.1-248.4:1; 2002, c. 747; 2003, cc. 986, 1013; 2005, cc. 767, 806.)

§ 63.2-1512. Immunity of person making report, etc., from liability.

Any person making a report pursuant to § 63.2-1509, a complaint pursuant to § 63.2-1510, or who takes a child into custody pursuant to § 63.2-1517, or who participates in a judicial proceeding resulting therefrom shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent.

(1975, c. 341, § 63.1-248.5; 1988, c. 686; 2002, c. 747.)

§ 63.2-1513. Knowingly making false reports; penalties.

A. Any person fourteen years of age or older who makes or causes to be made a report of child abuse or neglect pursuant to this chapter that he knows to be false shall be guilty of a Class 1 misdemeanor. Any person fourteen years of age or older who has been previously convicted under this subsection and who is subsequently convicted under this subsection shall be guilty of a Class 6 felony.

B. The child-protective services records regarding the person who was alleged to have committed abuse or neglect that result from a report for which a conviction is obtained under this section shall be purged immediately by any custodian of such records upon presentation to the custodian of a certified copy of such conviction. After purging the records, the custodian shall notify the person in writing that such records have been purged.

(1996, cc. 813, 836, § 63.1-248.5:1.01; 1999, c. 828; 2002, c. 747.)

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§ 63.2-1514. Retention of records in all reports; procedures regarding unfounded reports alleged to be made in bad faith or with malicious intent.

A. The local department shall retain the records of all reports or complaints made pursuant to this chapter, in accordance with regulations adopted by the Board.

B. The Department shall maintain a child abuse and neglect information system that includes a central registry of founded complaints, pursuant to § 63.2-1515. The Department shall maintain all (i) unfounded investigations, (ii) family assessments, and (iii) reports or complaints determined to be not valid in a record which is separate from the central registry and accessible only to the Department and to local departments for child-protective services. The purpose of retaining these complaints or reports is to provide local departments with information regarding prior complaints or reports. In no event shall the mere existence of a prior complaint or report be used to determine that a subsequent complaint or report is founded. The subject of the complaint or report is the person who is alleged to have committed abuse or neglect. The subject of the complaint or report shall have access to his own record. The record of unfounded investigations and complaints and reports determined to be not valid shall be purged one year after the date of the complaint or report if there are no subsequent complaints or reports regarding the same child or the person who is the subject of the complaint or report in that one year. The local department shall retain such records for an additional period of up to two years if requested in writing by the person who is the subject of such complaint or report. The record of family assessments shall be purged three years after the date of the complaint or report if there are no subsequent complaints or reports regarding the same child or the person who is the subject of the report in that three-year period. The child-protective services records regarding the petitioner which result from such complaint or report shall be purged immediately by any custodian of such records upon presentation to the custodian of a certified copy of a court order that there has been a civil action that determined that the complaint or report was made in bad faith or with malicious intent. After purging the records, the custodian shall notify the petitioner in writing that the records have been purged.

C. At the time the local department notifies a person who is the subject of a complaint or report made pursuant to this chapter that such complaint or report is either an unfounded investigation or a completed family assessment, it shall notify him how long the record will be retained and of the availability of the procedures set out in this section regarding reports or complaints alleged to be made in bad faith or with malicious intent. Upon request, the local department shall advise the person who was the subject of an unfounded investigation if the complaint or report was made anonymously. However, the identity of a complainant or reporter shall not be disclosed.

D. Any person who is the subject of an unfounded report or complaint made pursuant to this chapter who believes that such report or complaint was made in bad faith or with malicious intent may petition the circuit court in the jurisdiction in which the report or complaint was made for the release to such person of the records of the investigation or family assessment. Such petition shall specifically set forth the reasons such person

believes that such report or complaint was made in bad faith or with malicious intent. Upon the filing of such petition, the circuit court shall request and the local department shall provide to the circuit court its records of the investigation or family assessment for the circuit court's in camera review. The petitioner shall be entitled to present evidence to support his petition. If the circuit court determines that there is a reasonable question of fact as to whether the report or complaint was made in bad faith or with malicious intent and that disclosure of the identity of the complainant would not be likely to endanger the life or safety of the complainant, it shall provide to the petitioner a copy of the records of the investigation or family assessment. The original records shall be subject to discovery in any subsequent civil action regarding the making of a complaint or report in bad faith or with malicious intent.

(1988, c. 686, § 63.1-248.5:1; 1996, cc. 780, 791; 2000, c. 500; 2002, c. 747; 2003, c. 634; 2005, c. 77.)

§ 63.2-1515. Central registry; disclosure of information.

The central registry shall contain such information as shall be prescribed by Board regulation; however, when the founded case of abuse or neglect does not name the parents or guardians of the child as the abuser or neglector, and the abuse or neglect occurred in a licensed or unlicensed child day center, a licensed, registered or approved family day home, a private or public school, or a children's residential facility, the child's name shall not be entered on the registry without consultation with and permission of the parents or guardians. If a child's name currently appears on the registry without consultation with and permission of the parents or guardians for a founded case of abuse and neglect that does not name the parents or guardians of the child as the abuser or neglector, such parents or guardians may have the child's name removed by written request to the Department. The information contained in the central registry shall not be open to inspection by the public. However, appropriate disclosure may be made in accordance with Board regulations.

The Department shall respond to requests for a search of the central registry made by (i) local departments and (ii) local school boards regarding applicants for employment, pursuant to § 22.1-296.4, in cases where there is no match within the central registry within 10 business days of receipt of such requests. In cases where there is a match within the central registry regarding applicants for employment, the Department shall respond to requests made by local departments and local school boards within 30 business days of receipt of such requests. The response may be by first-class mail or facsimile transmission.

Any central registry check of a person who has applied to be a volunteer with a (a) Virginia affiliate of Big Brothers/Big Sisters of America, (b) Virginia affiliate of Compeer, (c) Virginia affiliate of Childhelp USA/rs, (d) volunteer fire company or volunteer rescue squad, or (e) with a court-appointed special advocate program pursuant to § 9.1-153 shall be conducted at no charge.

(1975, c. 341, § 63.1-248.8; 1993, cc. 48, 348, 955; 1994, cc. 700, 830; 2000, cc. 95, 734, 805; 2001, c. 321; 2002, cc. 371, 747; 2004, c. 74.)

§ 63.2-1516. Tape recording child abuse investigations.

Any person who is suspected of abuse or neglect of a child and who is the subject of an investigation or family assessment pursuant to this chapter may tape record any communications between him and child-protective services personnel that take place during the course of such investigation or family assessment, provided all parties to the conversation are aware the conversation is to be recorded. The parties' knowledge of the recording shall be demonstrated by a declaration at the beginning of the recorded portion of the conversation that the recording is to be made. If a person who is suspected of abuse or neglect of a child and who is the subject of an investigation or family assessment pursuant to this chapter elects to make a tape recording as provided in this section, the child-protective services personnel may also make such a recording.

(1990, c. 867, § 63.1-248.6:2; 2000, c. 500; 2002, c. 747.)

§ 63.2-1516.01. Investigation procedures involving person who is the subject of complaint.

The local department shall, at the initial time of contact with the person subject to a child abuse and neglect investigation, advise such person of the complaints or allegations made against the person, in a manner that is consistent with laws protecting the rights of the person making the report or complaint. In cases where a child is alleged to have been abused or neglected by a teacher, principal or other person employed by a local school board or employed in a school operated by the Commonwealth, in the course of such employment in a nonresidential setting, the provisions of § 63.2-1516.1 shall also apply.

(2004, cc. 93, 233.)

§ 63.2-1516.1. Investigation procedures when school employee is subject of the complaint or report; release of information in joint investigations.

A. Except as provided in subsection B of this section, in cases where a child is alleged to have been abused or neglected by a teacher, principal or other person employed by a local school board or employed in a school operated by the Commonwealth, in the course of such employment in a nonresidential setting, the local department conducting the investigation shall comply with the following provisions in conducting its investigation:

1. The local department shall conduct a face-to-face interview with the person who is the subject of the complaint or report.

2. At the onset of the initial interview with the alleged abuser or neglector, the local department shall notify him in writing of the general nature of the complaint and the identity of the alleged child victim regarding the purpose of the contacts.

3. The written notification shall include the information that the alleged abuser or neglector has the right to have an attorney or other representative of his choice present during his interviews. However, the failure by a representative of the Department of Social Services to so advise the subject of the complaint shall not cause an otherwise voluntary statement to be inadmissible in a criminal proceeding.

4. Written notification of the findings shall be submitted to the alleged abuser or neglector. The notification shall include a summary of the investigation and an explanation of how the information gathered supports the disposition.

5. The written notification of the findings shall inform the alleged abuser or neglector of his right to appeal.

6. The written notification of the findings shall inform the alleged abuser or neglector of his right to review information about himself in the record with the following exceptions:

a. The identity of the person making the report.

b. Information provided by any law-enforcement official.

c. Information that may endanger the well-being of the child.

d. The identity of a witness or any other person if such release may endanger the life or safety of such witness or person.

B. In all cases in which an alleged act of child abuse or neglect is also being criminally investigated by a law-enforcement agency, and the local department is conducting a joint investigation with a law-enforcement officer in regard to such an alleged act, no information in the possession of the local department from such joint investigation shall be released by the local department except as authorized by the investigating law-enforcement officer or his supervisor or the local attorney for the Commonwealth.

C. Failure to comply with investigation procedures does not preclude a finding of abuse or neglect if such a finding is warranted by the facts.

(2003, cc. 986, 1013.)

§ 63.2-1517. Authority to take child into custody.

A. A physician or child-protective services worker of a local department or law-enforcement official investigating a report or complaint of abuse and neglect may take a child into custody for up to 72 hours without prior approval of parents or guardians provided:

1. The circumstances of the child are such that continuing in his place of residence or in the care or custody of the parent, guardian, custodian or other person responsible for the

child's care, presents an imminent danger to the child's life or health to the extent that severe or irremediable injury would be likely to result or if evidence of abuse is perishable or subject to deterioration before a hearing can be held;

2. A court order is not immediately obtainable;

3. The court has set up procedures for placing such children;

4. Following taking the child into custody, the parents or guardians are notified as soon as practicable. Every effort shall be made to provide such notice in person;

5. A report is made to the local department; and

6. The court is notified and the person or agency taking custody of such child obtains, as soon as possible, but in no event later than 72 hours, an emergency removal order pursuant to § 16.1-251; however, if a preliminary removal order is issued after a hearing held in accordance with § 16.1-252 within 72 hours of the removal of the child, an emergency removal order shall not be necessary. Any person or agency petitioning for an emergency removal order after four hours have elapsed following taking custody of the child shall state the reasons therefor pursuant to § 16.1-251.

B. If the 72-hour period for holding a child in custody and for obtaining a preliminary or emergency removal order expires on a Saturday, Sunday, or legal holiday or day on which the court is lawfully closed, the 72 hours shall be extended to the next day that is not a Saturday, Sunday, or legal holiday or day on which the court is lawfully closed.

(1975, c. 341, § 63.1-248.9; 1977, c. 559; 1992, c. 688; 1994, c. 643; 1998, c. 760; 2001, c. 837; 2002, c. 747; 2003, c. 508.)

§ 63.2-1518. Authority to talk to child or sibling.

Any person required to make a report or conduct an investigation or family assessment, pursuant to this chapter may talk to any child suspected of being abused or neglected or to any of his siblings without consent of and outside the presence of his parent, guardian, legal custodian, or other person standing in loco parentis, or school personnel.

(1975, c. 341, § 63.1-248.10; 1979, c. 453; 1986, c. 308; 2000, c. 500; 2002, c. 747.)

§ 63.2-1519. Physician-patient and husband-wife privileges inapplicable.

In any legal proceeding resulting from the filing of any report or complaint pursuant to this chapter, the physician-patient and husband-wife privileges shall not apply.

(1975, c. 341, § 63.1-248.11; 2002, c. 747.)

§ 63.2-1520. Photographs and X-rays of child; use as evidence.

In any case of suspected child abuse, photographs and X-rays of the child may be taken without the consent of the parent or other person responsible for such child as a part of the medical evaluation. Photographs of the child may also be taken without the consent of the parent or other person responsible for such child as a part of the investigation or family assessment of the case by the local department or the court; however, such photographs shall not be used in lieu of medical evaluation. Such photographs and X-rays may be introduced into evidence in any subsequent proceeding.

The court receiving such evidence may impose such restrictions as to the confidentiality of photographs of any minor as it deems appropriate.

(1975, c. 341, § 63.1-248.13; 1978, c. 553; 2000, c. 500; 2002, c. 747.)

§ 63.2-1521. Testimony by child using two-way closed-circuit television.

A. In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to §§ 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-283 or § 20-107.2, the child's attorney or guardian ad litem or, if the child has been committed to the custody of a local department, the attorney for the local department may apply for an order from the court that the testimony of the alleged victim or of a child witness be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The person seeking such order shall apply for the order at least seven days before the trial date.

B. The provisions of this section shall apply to the following:

1. An alleged victim who was fourteen years of age or under on the date of the alleged offense and is sixteen or under at the time of the trial; and

2. Any child witness who is fourteen years of age or under at the time of the trial.

C. The court may order that the testimony of the child be taken by closed-circuit television as provided in subsections A and B if it finds that the child is unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons:

1. The child's persistent refusal to testify despite judicial requests to do so;

2. The child's substantial inability to communicate about the offense; or

3. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.

Any ruling on the child's unavailability under this subsection shall be supported by the court with findings on the record or with written findings in a court not of record.

D. In any proceeding in which closed-circuit television is used to receive testimony, the attorney for the child and the defendant's attorney and, if the child has been committed to the custody of a local board, the attorney for the local board shall be present in the room with the child, and the child shall be subject to direct and cross examination. The only other persons allowed to be present in the room with the child during his testimony shall be the guardian ad litem, those persons necessary to operate the closed-circuit equipment, and any other person whose presence is determined by the court to be necessary to the welfare and well-being of the child.

E. The child's testimony shall be transmitted by closed-circuit television into the courtroom for the defendant, jury, judge and public to view. The defendant shall be provided with a means of private, contemporaneous communication with his attorney during the testimony.

(1988, c. 845, § 63.1-248.13:1; 1999, c. 668; 2002, c. 747.)

§ 63.2-1522. Admission of evidence of sexual acts with children.

A. In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to §§ 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-283 or § 20-107.2, an out-of-court statement made by a child the age of twelve or under at the time the statement is offered into evidence, describing any act of a sexual nature performed with or on the child by another, not otherwise admissible by statute or rule, may be admissible in evidence if the requirements of subsection B are met.

B. An out-of-court statement may be admitted into evidence as provided in subsection A if:

1. The child testifies at the proceeding, or testifies by means of a videotaped deposition or closed-circuit television, and at the time of such testimony is subject to cross examination concerning the out-of-court statement or the child is found by the court to be unavailable to testify on any of these grounds:

a. The child's death;

b. The child's absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;

c. The child's total failure of memory;

d. The child's physical or mental disability;

e. The existence of a privilege involving the child;

f. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; and

g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.

2. The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness and reliability.

C. A statement may not be admitted under this section unless the proponent of the statement notifies the adverse party of his intention to offer the statement and the substance of the statement sufficiently in advance of the proceedings to provide the adverse party with a reasonable opportunity to prepare to meet the statement, including the opportunity to subpoena witnesses.

D. In determining whether a statement possesses particularized guarantees of trustworthiness and reliability under subdivision B 2, the court shall consider, but is not limited to, the following factors:

1. The child's personal knowledge of the event;

2. The age and maturity of the child;

3. Certainty that the statement was made, including the credibility of the person testifying about the statement and any apparent motive such person may have to falsify or distort the event including bias, corruption or coercion;

4. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;

5. The timing of the child's statement;

6. Whether more than one person heard the statement;

7. Whether the child was suffering pain or distress when making the statement;

8. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

9. Whether the statement has internal consistency or coherence, and uses terminology appropriate to the child's age;

10. Whether the statement is spontaneous or directly responsive to questions;

11. Whether the statement is responsive to suggestive or leading questions; and

12. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

E. The court shall support with findings on the record, or with written findings in a court not of record, any rulings pertaining to the child's unavailability and the trustworthiness and reliability of the out-of-court statement.

(1988, c. 892, § 63.1-248.13:2; 2002, c. 747.)

§ 63.2-1523. Use of videotaped statements of complaining witnesses as evidence.

A. In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to §§ 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-283 or § 20-107.2, a recording of a statement of the alleged victim of the offense, made prior to the proceeding, may be admissible as evidence if the requirements of subsection B are met and the court determines that:

1. The alleged victim is the age of twelve or under at the time the statement is offered into evidence;

2. The recording is both visual and oral, and every person appearing in, and every voice recorded on, the tape is identified;

3. The recording is on videotape or was recorded by other electronic means capable of making an accurate recording;

4. The recording has not been altered;

5. No attorney for any party to the proceeding was present when the statement was made;

6. The person conducting the interview of the alleged victim was authorized to do so by the child-protective services coordinator of the local department;

7. All persons present at the time the statement was taken, including the alleged victim, are present and available to testify or be cross examined at the proceeding when the recording is offered; and

8. The parties or their attorneys were provided with a list of all persons present at the recording and were afforded an opportunity to view the recording at least ten days prior to the scheduled proceedings.

B. A recorded statement may be admitted into evidence as provided in subsection A if:

1. The child testifies at the proceeding, or testifies by means of closed-circuit television, and at the time of such testimony is subject to cross examination concerning the recorded statement or the child is found by the court to be unavailable to testify on any of these grounds:

a. The child's death;

b. The child's absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;

c. The child's total failure of memory;

d. The child's physical or mental disability;

e. The existence of a privilege involving the child;

f. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason;

g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of closed-circuit television; and

2. The child's recorded statement is shown to possess particularized guarantees of trustworthiness and reliability.

C. A recorded statement may not be admitted under this section unless the proponent of the statement notifies the adverse party of his intention to offer the statement and the substance of the statement sufficiently in advance of the proceedings to provide the adverse party with a reasonable opportunity to prepare to meet the statement, including the opportunity to subpoena witnesses.

D. In determining whether a recorded statement possesses particularized guarantees of trustworthiness and reliability under subdivision B 2, the court shall consider, but is not limited to, the following factors:

1. The child's personal knowledge of the event;

2. The age and maturity of the child;

3. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;

4. The timing of the child's statement;

5. Whether the child was suffering pain or distress when making the statement;

6. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

7. Whether the statement has a "ring of verity," has internal consistency or coherence, and uses terminology appropriate to the child's age;

8. Whether the statement is spontaneous or directly responsive to questions;

9. Whether the statement is responsive to suggestive or leading questions; and

10. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

E. The court shall support with findings on the record, or with written findings in a court not of record, any rulings pertaining to the child's unavailability and the trustworthiness and reliability of the recorded statement.

(1988, c. 900, § 63.1-248.13:3; 2002, c. 747.)

§ 63.2-1524. Court may order certain examinations.

The court may order psychological, psychiatric and physical examinations of the child alleged to be abused or neglected and of the parents, guardians, caretakers or siblings of a child suspected of being neglected or abused.

(1975, c. 341, § 63.1-248.14; 1976, c. 186; 2002, c. 747.)

§ 63.2-1525. Prima facie evidence for removal of child custody.

In the case of a petition in the court for removal of custody of a child alleged to have been abused or neglected, competent evidence by a physician that a child is abused or neglected shall constitute prima facie evidence to support such petition.

(1975, c. 341, § 63.1-248.15; 2002, c. 747.)

§ 63.2-1526. Appeals of certain actions of local departments.

A. A person who is suspected of or is found to have committed abuse or neglect may, within thirty days of being notified of that determination, request the local department rendering such determination to amend the determination and the local department's related records. Upon written request, the local department shall provide the appellant all information used in making its determination. Disclosure of the reporter's name or information which may endanger the well-being of a child shall not be released. The identity of a collateral witness or any other person shall not be released if disclosure may endanger his life or safety. Information prohibited from being disclosed by state or federal law or regulation shall not be released. The local department shall hold an informal conference or consultation where such person, who may be represented by counsel, shall be entitled to informally present testimony of witnesses, documents, factual data, arguments or other submissions of proof to the local department. With the exception of the local director, no person whose regular duties include substantial involvement with child abuse and neglect cases shall preside over the informal conference. If the local department refuses the request for amendment or fails to act within forty-five days after

receiving such request, the person may, within thirty days thereafter, petition the Commissioner, who shall grant a hearing to determine whether it appears, by a preponderance of the evidence, that the determination or record contains information which is irrelevant or inaccurate regarding the commission of abuse or neglect by the person who is the subject of the determination or record and therefore shall be amended. A person who is the subject of a report who requests an amendment to the record, as provided above, has the right to obtain an extension for an additional specified period of up to sixty days by requesting in writing that the forty-five days in which the local department must act be extended. The extension period, which may be up to sixty days, shall begin at the end of the forty-five days in which the local department must act. When there is an extension period, the thirty-day period to request an administrative hearing shall begin on the termination of the extension period.

B. The Commissioner shall designate and authorize one or more members of his staff to conduct such hearings. The decision of any staff member so designated and authorized shall have the same force and effect as if the Commissioner had made the decision. The hearing officer shall have the authority to issue subpoenas for the production of documents and the appearance of witnesses. The hearing officer is authorized to determine the number of depositions that will be allowed and to administer oaths or affirmations to all parties and witnesses who plan to testify at the hearing. The Board shall adopt regulations necessary for the conduct of such hearings. Such regulations shall include provisions stating that the person who is the subject of the report has the right (i) to submit oral or written testimony or documents in support of himself and (ii) to be informed of the procedure by which information will be made available or withheld from him. In case of any information withheld, such person shall be advised of the general nature of such information and the reasons, for reasons of privacy or otherwise, that it is being withheld. Upon giving reasonable notice, either party at his own expense may depose a nonparty and submit such deposition at the hearing pursuant to Board regulation. Upon good cause shown, after a party's written motion, the hearing officer may issue subpoenas for the production of documents or to compel the attendance of witnesses at the hearing, except that alleged child victims of the person and their siblings shall not be subpoenaed, deposed or required to testify. The person who is the subject of the report may be represented by counsel at the hearing. Upon petition, the court shall have the power to enforce any subpoena that is not complied with or to review any refusal to issue a subpoena. Such decisions may not be further appealed except as part of a final decision that is subject to judicial review. Such hearing officers are empowered to order the amendment of such determination or records as is required to make them accurate and consistent with the requirements of this chapter or the regulations adopted hereunder. If, after hearing the facts of the case, the hearing officer determines that the person who is the subject of the report has presented information that was not available to the local department at the time of the local conference and which if available may have resulted in a different determination by the local department, he may remand the case to the local department for reconsideration. The local department shall have fourteen days in which to reconsider the case. If, at the expiration of fourteen days, the local department fails to act or fails to amend the record to the satisfaction of the appellant, the case shall be returned to the hearing officer for a determination. If aggrieved by the decision of the

hearing officer, such person may obtain further review of the decision in accordance with Article 5 (§ 2.2-4025 et seq.) of the Administrative Process Act (§ 2.2-4000 et seq.).

C. Whenever an appeal of the local department's finding is made and a criminal charge is also filed against the appellant for the same conduct involving the same victim as investigated by the local department, the appeal process shall automatically be stayed until the criminal prosecution in circuit court is completed. During such stay, the appellant's right of access to the records of the local department regarding the matter being appealed shall also be stayed. Once the criminal prosecution in circuit court has been completed, the local department shall advise the appellant in writing of his right to resume his appeal within the time frames provided by law and regulation.

(1988, c. 407, § 63.1-248.6:1; 1993, cc. 188, 955, 963; 1995, c. 7; 2002, c. 747.)

§ 63.2-1527. Board oversight duties; Out-of-Family Investigations Advisory Committee.

A. The Board shall be responsible for establishing standards for out-of-family investigations and for the implementation of the family assessment track of the differential response system.

B. The Out-of-Family Investigations Advisory Committee (the Committee) is hereby established as an advisory committee in the executive branch of state government.

C. The Committee shall consist of 15 members as follows: one representative of public school employees, one representative of a hospital for children, one representative of a licensed child care center, one representative of a juvenile detention home, one representative of a public or private residential facility for children, one representative of a family day care home, one representative of a local department of Social Services, one representative of a religious organization with a program for children, one representative of Virginians for Child Abuse Prevention and six citizens of the Commonwealth at large. The Chairman of the Board shall appoint such persons for terms established by the Board.

D. The Committee shall advise the Board on the effectiveness of the policies and standards governing out-of-family investigations.

E. The Committee shall elect a chairman and vice-chairman from among its membership. A majority of the members shall constitute a quorum. The meetings of the Committee shall be held at the call of the chairman or whenever the majority of the voting members so request.

F. Members shall receive no compensation for their services nor be reimbursed for expenses incurred in the discharge of their duties as provided in §§ 2.2-2813 and 2.2-2825.

G. The Department of Social Services shall provide staff support to the Committee. All agencies of the Commonwealth shall provide assistance to the Committee, upon request.

(1993, c. 955, § 63.1-248.7:1; 2000, c. 500; 2002, c. 747; 2004, c. 103.)

§ 63.2-1528. Advisory Committee continued as Advisory Board.

The Advisory Committee on Child Abuse and Neglect is continued and shall hereafter be known as the Advisory Board on Child Abuse and Neglect. The Advisory Board shall be composed of nine persons appointed by the Governor for three-year staggered terms, and permanent members including the Superintendent of Public Instruction, the Commissioner of the Department of Health, the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services, the Commissioner of the Department of Social Services, the Director of the Department of Juvenile Justice, the Director of the Department of Corrections, the Director of the Department of Criminal Justice Services, and the Attorney General of Virginia, or their designees. The Advisory Board shall meet quarterly and, as the need may arise, advise the Department, Board and Governor on matters concerning programs for the prevention and treatment of abused and neglected children and their families and child abuse and neglect issues identified by the Commissioner of the Department of Social Services.

(1975, c. 341, § 63.1-248.16; 1979, c. 700; 1980, c. 319; 1985, c. 448; 1989, c. 733; 1990, c. 358; 1991, c. 563; 2002, c. 747; 2004, c. 69.)

§ 63.2-1529. Evaluation of the child-protective services differential response system.

The Department shall evaluate and report on the impact and effectiveness of the implementation of the child-protective services differential response system in meeting the purposes set forth in this chapter. The evaluation shall include, but is not limited to, the following information: changes in the number of investigations, the number of families receiving services, the number of families rejecting services, the effectiveness of the initial assessment in determining the appropriate level of intervention, the impact on out-of-home placements, the availability of needed services, community cooperation, successes and problems encountered, the overall operation of the child-protective services differential response system and recommendations for improvement. The Department shall submit annual reports on or before December 15 to the House Committee on Health, Welfare and Institutions and the Senate Committee on Rehabilitation and Social Services.

(2000, c. 500, § 63.1-248.19; 2002, cc. 641, 747; 2005, c. 633.)

Virginia Administrative Code - updated through July 1, 2008

22VAC40-700-10. Definitions.

The following words and terms when used in conjunction with this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Central registry" means a subset of the child abuse and neglect information system and is the name index with identifying information of individuals named as an abuser and/or neglector in founded child abuse and /or neglect complaints or reports not currently under administrative appeal, maintained by the department.

"Child protective services" means the identification, receipt and immediate investigation of complaints and reports of child abuse and neglect for children under 18 years of age. It also includes documenting, arranging for, or providing social casework and other services for the child, his family, and the alleged abuser.

"Complaint" means a valid report of suspected child abuse or neglect which shall be investigated by the local department of social services.

"Founded" means that a review of all the facts shows by a preponderance of the evidence that child abuse or neglect has occurred.

"Identifying information" means name, race, sex, and date of birth of the subject.

"Investigating agency" means the local department of social services responsible for conducting investigations of child abuse or neglect complaints pursuant to §63.2-1503 of the Code of Virginia.

"Unfounded" means that a review of the facts shows no reason to believe that abuse or neglect occurred.

Statutory Authority

§§63.2-217 and Chapter 15 (63.2-1500 et seq.) of Title 63.2 of the Code of Virginia.

Part II

Policy

22VAC40-700-20. Levels of founded cases.

The three levels of founded cases are:

1. Level 1. This level includes those injuries/conditions, real or threatened, that result in or were likely to have resulted in serious harm to a child.

2. Level 2. This level includes those injuries/conditions, real or threatened, that result in or were likely to have resulted in moderate harm to a child.

3. Level 3. This level includes those injuries/conditions, real or threatened, that result in minimal harm to a child.

Statutory Authority

§§63.2-217 and Chapter 15 (63.2-1500 et seq.) of Title 63.2 of the Code of Virginia.

22VAC40-700-30. Maintenance of identifying information.

Identifying information in reports of child abuse and neglect shall be maintained in the central registry as follows:

1. Eighteen years past the date of the complaint for all complaints determined by the investigating agency to be founded, Level 1.

2. Seven years past the date of the complaint for all complaints determined by the investigating agency to be founded, Level 2.

3. Three years past the date of the complaint for all complaints determined by the investigating agency to be founded, Level 3.

If an individual is involved in more than one complaint, the information from all complaints will be maintained until the last deletion date has been reached.

Statutory Authority

§§63.2-217 and Chapter 15 (63.2-1500 et seq.) of Title 63.2 of the Code of Virginia.

22VAC40-705-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

"Abuser or neglector" means any person who is found to have committed the abuse and/or neglect of a child pursuant to Chapter 15 (§63.2-1500 et seq.) of Title 63.2 of the Code of Virginia.

"Administrative appeal rights" means the child protective services appeals procedures for a local level informal conference and a state level hearing pursuant to §63.2-1526 of the Code of Virginia, under which an individual who is found to have committed abuse and/or neglect may request that the local department's records be amended.

"Appellant" means anyone who has been found to be an abuser and/or neglector and appeals the founded disposition to the director of the local department of social services, an administrative hearing officer, or to circuit court.

"Assessment" means the process by which child protective services workers determine a child's and family's needs.

"Caretaker" means any individual having the responsibility of providing care for a child and includes the following: (i) parent or other person legally responsible for the child's care; (ii) any other person who has assumed caretaking responsibility by virtue of an agreement with the legally responsible person; (iii) persons responsible by virtue of their positions of conferred authority; and (iv) adult persons residing in the home with the child.

"Case record" means a collection of information maintained by a local department, including written material, letters, documents, tapes, photographs, film or other materials regardless of physical form about a specific child protective services investigation, family or individual.

"Central Registry" means a subset of the child abuse and neglect information system and is the name index with identifying information of individuals named as an abuser and/or neglector in founded child abuse and/or neglect complaints or reports not currently under administrative appeal, maintained by the department.

"Certified substance abuse counselor" means a person certified to provide substance abuse counseling in a state-approved public or private substance abuse program or facility.

"Child abuse and neglect information system" means the computer system which collects and maintains information regarding incidents of child abuse and neglect involving parents or other caretakers. The computer system is composed of three parts: the statistical information system with nonidentifying information, the Central Registry of founded complaints not on appeal, and a database that can be accessed only by the department and local departments that contains all nonpurged CPS reports. This system is the official state automated system.

"Child protective services" means the identification, receipt and immediate response to complaints and reports of alleged child abuse and/or neglect for children under 18 years of age. It also includes assessment, and arranging for and providing necessary protective and rehabilitative services for a child and his family when the child has been found to have been abused or neglected or is at risk of being abused or neglected.

"Child protective services worker" means one who is qualified by virtue of education, training and supervision and is employed by the local department to respond to child protective services complaints and reports of alleged child abuse and/or neglect.

"Chronically and irreversibly comatose" means a condition caused by injury, disease or illness in which a patient has suffered a loss of consciousness with no behavioral evidence of self-awareness or awareness of surroundings in a learned manner other than reflexive activity of muscles and nerves for low-level conditioned response and from which to a reasonable degree of medical probability there can be no recovery.

"Collateral" means a person whose personal or professional knowledge may help confirm or rebut the allegations of child abuse and/or neglect or whose involvement may help ensure the safety of the child.

"Complaint" means any information or allegation of child abuse and/or neglect made orally or in writing pursuant to §63.2-100 of the Code of Virginia.

"Consultation" means the process by which the alleged abuser and/or neglector may request an informal meeting to discuss the investigative findings with the local department prior to the local department rendering a founded disposition of abuse and/or neglect against that person pursuant to §63.2-1526 A of the Code of Virginia.

"Controlled substance" means a drug, substance or marijuana as defined in §18.2-247 of the Code of Virginia including those terms as they are used or defined in the Drug Control Act, Chapter 34 (§54.1-3400 et seq.) of Title 54.1 of the Code of Virginia. The term does not include alcoholic beverages or tobacco as those terms are defined or used in Title 3.1 or Title 4.1 of the Code of Virginia.

"Department" means the Virginia Department of Social Services.

"Differential response system" means that local departments of social services may respond to valid reports or complaints of child abuse or neglect by conducting either a family assessment or an investigation.

"Disposition" means the determination of whether or not child abuse and/or neglect has occurred.

"Documentation" means information and materials, written or otherwise, concerning allegations, facts and evidence.

"Family Advocacy Program representative" means the professional employed by the United States Armed Forces who has responsibility for the program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up and reporting of family violence, pursuant to 22VAC40-720-20.

"Family assessment" means the collection of information necessary to determine:

1. The immediate safety needs of the child;

2. The protective and rehabilitative services needs of the child and family that will deter abuse or neglect;

3. Risk of future harm to the child; and

4. Alternative plans for the child's safety if protective and rehabilitative services are indicated and the family is unable or unwilling to participate in services. These arrangements may be made in consultation with the caretaker(s) of the child.

"First source" means any direct evidence establishing or helping to establish the existence or nonexistence of a fact. Indirect evidence and anonymous complaints do no constitute first source evidence.

"Founded" means that a review of the facts shows by a preponderance of the evidence that child abuse and/or neglect has occurred. A determination that a case is founded shall be based primarily on first source evidence; in no instance

shall a determination that a case is founded be based solely on indirect evidence or an anonymous complaint.

"He" means he or she.

"His" means his or her.

"Identifying information" means name, social security number, address, race, sex, and date of birth.

"Indirect evidence" means any statement made outside the presence of the child protective services worker and relayed to the child protective services worker as proof of the contents of the statement.

"Investigation" means the collection of information to determine:

1. The immediate safety needs of the child;

2. The protective and rehabilitative services needs of the child and family that will deter abuse or neglect;

3. Risk of future harm to the child;

4. Alternative plans for the child's safety if protective and rehabilitative services are indicated and the family is unable or unwilling to participate in services;

5. Whether or not abuse or neglect has occurred;

6. If abuse or neglect has occurred, who abused or neglected the child; and

7. A finding of either founded or unfounded based on the facts collected during the investigation.

"Investigative narrative" means the written account of the investigation contained in the child protective services case record.

"Legitimate interest" means a lawful, demonstrated privilege to access the information as defined in §63.2-104 of the Code of Virginia.

"Licensed substance abuse treatment practitioner" means a person who (i) is trained in and engages in the practice of substance abuse treatment with individuals or groups of individuals suffering from the effects of substance abuse or dependence, and in the prevention of substance abuse or dependence and (ii) is licensed to provide advanced substance abuse treatment and independent, direct and unsupervised treatment to such individuals or groups of individuals, and to plan, evaluate, supervise, and direct substance abuse treatment provided by others.

"Local department" means the city or county local agency of social services or department of public welfare in the Commonwealth of Virginia responsible for conducting investigations of child abuse and/or neglect complaints or reports pursuant to §63.2-1503 of the Code of Virginia.

"Local department of jurisdiction" means the local department in the city or county in Virginia where the alleged victim child resides or in which the alleged abuse and/or neglect is believed to have occurred. If neither of these is known, then the local department of jurisdiction shall be the local department in the county or city where the abuse and/or neglect was discovered.

"Mandated reporters" means those persons who are required to report suspicions of child abuse and/or neglect pursuant to §63.2-1509 of the Code of Virginia.

"Monitoring" means contacts with the child, family and collaterals which provide information about the child's safety and the family's compliance with the service plan.

"Multidisciplinary teams" means any organized group of individuals representing, but not limited to, medical, mental health, social work, education, legal and law enforcement, which will assist local departments in the protection

and prevention of child abuse and neglect pursuant to §63.2-1503 K of the Code of Virginia. Citizen representatives may also be included.

"Notification" means informing designated and appropriate individuals of the local department's actions and the individual's rights.

"Preponderance of evidence" means the evidence as a whole shows that the facts are more probable and credible than not. It is evidence which is of greater weight or more convincing than the evidence offered in opposition.

"Purge" means to delete or destroy any reference data and materials specific to subject identification contained in records maintained by the department and the local department pursuant to §§63.2-1513 and 63.2-1514 of the Code of Virginia.

"Reasonable diligence" means the exercise of justifiable and appropriate persistent effort.

"Report" means either a complaint as defined in this section or an official document on which information is given concerning abuse and neglect. A report is required to be made by persons designated herein and by local departments in those situations in which a response to a complaint from the general public reveals suspected child abuse and/or neglect pursuant to subdivision 5 of the definition of abused or neglected child in §63.2-100 of the Code of Virginia.

"Safety plan" means an immediate course of action designed to protect a child from abuse or neglect.

"Service plan" means a plan of action to address the service needs of a child and/or his family in order to protect a child and his siblings, to prevent future abuse and neglect, and to preserve the family life of the parents and children whenever possible.

"State automated system" means the "child abuse and neglect information system" as previously defined.

"Substance abuse counseling or treatment services" are services provided to individuals for the prevention, diagnosis, treatment, or palliation of chemical dependency, which may include attendant medical and psychiatric complications of chemical dependency.

"Terminal condition" means a condition caused by injury, disease or illness from which to a reasonable degree of medical probability a patient cannot recover and (i) the patient's death is imminent or (ii) the patient is chronically and irreversibly comatose.

"Unfounded" means that a review of the facts does not show by a preponderance of the evidence that child abuse or neglect occurred.

"Valid report or complaint" means the local department of social services has evaluated the information and allegations of the report or complaint and determined that the local department shall conduct an investigation or family assessment because the following elements are present:

1. The alleged victim child or children are under the age of 18 at the time of the complaint or report;

2. The alleged abuser is the alleged victim child's parent or other caretaker;

3. The local department receiving the complaint or report is a local department of jurisdiction; and

4. The circumstances described allege suspected child abuse or neglect.

"Withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening condition by providing treatment (including appropriate nutrition, hydration, and medication) which in the treating physician's

or physicians' reasonable medical judgment will most likely be effective in ameliorating or correcting all such conditions.

22VAC40-705-20. General policy regarding complaints or reports of child abuse and neglect.

It is the policy of the Commonwealth of Virginia to require complaints and/or reports of child abuse and neglect for the following purposes:

1. Identifying abused and neglected children;

2. Assuring protective services to such identified children;

3. Preventing further abuse and neglect;

4. Preserving the family life of the parents and children, where possible, by enhancing parental capacity for adequate care.

22VAC40-705-30. Types of abuse and neglect.

A. Physical abuse occurs when a caretaker creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon a child a physical injury by other than accidental means or creates a substantial risk of death, disfigurement, or impairment of bodily functions, including, but not limited to, a child who is with his parent or other person responsible for his care either (i) during the manufacture or attempted manufacture of a Schedule I or II controlled substance or (ii) during the unlawful sale of such substance by that child's parents or other person responsible for his care, where such manufacture, or attempted manufacture or unlawful sale would constitute a felony violation of §18.2-248 of the Code of Virginia.

B. Physical neglect occurs when there is the failure to provide food, clothing, shelter, or supervision for a child to the extent that the child's health or safety is endangered. This also includes abandonment and situations where the parent's

or caretaker's own incapacitating behavior or absence prevents or severely limits the performing of child caring tasks pursuant to §63.2-100 of the Code of Virginia. In situations where the neglect is the result of family poverty and there are no outside resources available to the family, the parent or caretaker shall not be determined to have neglected the child; however, the local department may provide appropriate services to the family.

1. Physical neglect may include multiple occurrences or a one-time critical or severe event that results in a threat to health or safety.

2. Physical neglect may include failure to thrive.

a. Failure to thrive occurs as a syndrome of infancy and early childhood which is characterized by growth failure, signs of severe malnutrition, and variable degrees of developmental retardation.

b. Failure to thrive can only be diagnosed by a physician and is caused by nonorganic factors.

C. Medical neglect occurs when there is the failure by the caretaker to obtain or follow through with a complete regimen of medical, mental or dental care for a condition which if untreated could result in illness or developmental delays pursuant to §63.2-100 of the Code of Virginia. Medical neglect also includes withholding of medically indicated treatment.

1. A child who, in good faith, is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination pursuant to §63.2-100 of the Code of Virginia shall not for that reason alone be considered a neglected child.

2. For the purposes of this regulation, "withholding of medically indicated treatment" does not include the failure to provide treatment (other than

appropriate nutrition, hydration, or medication) to an infant when in the treating physician's or physicians' reasonable medical judgment:

a. The infant is chronically and irreversibly comatose;

b. The infant has a terminal condition and the provision of such treatment would:

(1) Merely prolong dying;

(2) Not be effective in ameliorating or correcting all of the infant's life-threatening conditions;

(3) Otherwise be futile in terms of the survival of the infant; or

(4) Be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

D. Mental abuse or neglect occurs when a caretaker creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon a child a mental injury by other than accidental means or creates a substantial risk of impairment of mental functions.

Mental abuse or neglect may include failure to thrive.

1. Failure to thrive occurs as a syndrome of infancy and early childhood which is characterized by growth failure, signs of severe malnutrition, and variable degrees of developmental retardation.

2. Failure to thrive can only be diagnosed by a physician and is caused by nonorganic factors.

E. Sexual abuse occurs when there is any act of sexual exploitation or any sexual act upon a child in violation of the law which is committed or allowed to be committed by the child's parents or other persons responsible for the care of the child pursuant to §63.2-100 of the Code of Virginia.

22VAC40-705-40. Complaints and reports of suspected child abuse and/or neglect.

A. Persons who are mandated to report are those individuals defined in §63.2-1509 of the Code of Virginia.

1. Mandated reporters shall report immediately any suspected abuse or neglect that they learn of in their professional capacity.

2. Mandated reporters shall disclose all information that is the basis for the suspicion of child abuse or neglect and shall make available, upon request, to the local department any records and reports that document the basis for the complaint and/or report.

3. A mandated reporter's failure to report within 72 hours of the first suspicion of child abuse or neglect shall result in a fine.

4. Pursuant to §63.2-1509 B of the Code of Virginia, certain specified facts indicating that a newborn infant may have been exposed to controlled substances prior to birth are sufficient to suspect that a child is abused or neglected. A diagnosis of fetal alcohol syndrome is also sufficient. Any report made pursuant to §63.2-1509 A of the Code of Virginia constitutes a valid report of abuse or neglect and requires a child protective services investigation, unless the mother sought treatment or counseling as required in this section and pursuant to §63.2-1505 B of the Code of Virginia.

a. The attending physician may designate a hospital staff person to make the report to the local department on behalf of the attending physician. That hospital staff person may include a nurse or hospital social worker.

b. Pursuant to §63.2-1509 of the Code of Virginia, whenever a physician makes a finding pursuant to §63.2-1509 A of the Code of

Virginia, then the physician or his designee must make a report to child protective services immediately. Pursuant to §63.2-1509 D of the Code of Virginia, a physician who fails to make a report pursuant to §63.2-1509 A of the Code of Virginia is subject to a fine.

c. When a report or complaint alleging abuse or neglect is made pursuant to §63.2-1509 A of the Code of Virginia, then the local department must immediately assess the infant's circumstances and any threat to the infant's health and safety. Pursuant to 22VAC40-705-110 A, the local department must conduct an initial assessment.

d. When a report or complaint alleging abuse or neglect is made pursuant to §63.2-1509 A of the Code of Virginia, then the local department must immediately determine whether to petition a juvenile and domestic relations district court for any necessary services or court orders needed to ensure the safety and health of the infant.

e. Within the first 14 days of receipt of a report made pursuant to §63.2-1509 A of the Code of Virginia, the local department shall invalidate the complaint if the following two conditions are met: (i) the mother of the infant sought substance abuse counseling or treatment during her pregnancy prior to the infant's birth and (ii) there is no evidence of child abuse and/or neglect by the mother after the infant's birth.

(1) The local department must notify the mother immediately upon receipt of a complaint made pursuant to §63.2-1509 A of the Code of Virginia. This notification must include a statement informing the mother that, if the mother fails to present evidence within 14 days of receipt of the complaint that she sought substance abuse

counseling/treatment during the pregnancy, the report will be accepted as valid and an investigation initiated.

(2) If the mother sought counseling or treatment but did not receive such services, then the local department must determine whether the mother made a substantive effort to receive substance abuse treatment before the child's birth. If the mother made a substantive effort to receive treatment or counseling prior to the child's birth, but did not receive such services due to no fault of her own, then the local department should invalidate the complaint or report.

(3) If the mother sought or received substance abuse counseling or treatment, but there is evidence, other than exposure to a controlled substance, that the child may be abused or neglected, then the local department may initiate the investigation.

f. Substance abuse counseling or treatment includes, but is not limited to, education about the impact of alcohol, controlled substances and other drugs on the fetus and on the maternal relationship; education about relapse prevention to recognize personal and environmental cues which may trigger a return to the use of alcohol or other drugs.

g. The substance abuse counseling or treatment should attempt to serve the purposes of improving the pregnancy outcome, treating the substance abuse disorder, strengthening the maternal relationship with existing children and the infant, and achieving and maintaining a sober and drug-free lifestyle.

h. The substance abuse counseling or treatment services must be provided by a professional. Professional substance abuse treatment or

counseling may be provided by a certified substance abuse counselor or a licensed substance abuse treatment practitioner.

i. Facts indicating that the infant may have been exposed to controlled substances prior to birth are not sufficient, in and of themselves, to render a founded disposition of abuse or neglect. The local department must establish, by a preponderance of the evidence, that the infant was abused or neglected according to the statutory and regulatory definitions of abuse and neglect.

j. The local department may provide assistance to the mother in locating and receiving substance abuse counseling or treatment.

B. Persons who may report child abuse and/or neglect include any individual who suspects that a child is being abused and/or neglected pursuant to §63.2-1510 of the Code of Virginia.

C. Complaints and reports of child abuse and/or neglect may be made anonymously. An anonymous complaint, standing alone, shall not meet the preponderance of evidence standard necessary to support a founded determination.

D. Any person making a complaint and/or report of child abuse and/or neglect shall be immune from any civil or criminal liability in connection therewith, unless the court decides that such person acted in bad faith or with malicious intent pursuant to §63.2-1512 of the Code of Virginia.

E. When the identity of the reporter is known to the department or local department, these agencies shall make every effort to protect the reporter's identity.

F. If a person suspects that he is the subject of a report or complaint of child abuse and/or neglect made in bad faith or with malicious intent, that person may

petition the court for access to the record including the identity of the reporter or complainant pursuant to §63.2-1514 of the Code of Virginia.

G. Any person age 14 years or older who makes or causes to be made a knowingly false complaint or report of child abuse and/or neglect and is convicted shall be guilty of a Class 1 misdemeanor for a first offense pursuant to §63.2-1513 of the Code of Virginia.

1. A subsequent conviction results in a Class 6 felony.

2. Upon receipt of notification of such conviction, the department will retain a list of convicted reporters.

3. The subject of the records may have the records purged upon presentation of proof of such conviction.

H. To make a complaint or report of child abuse and/or neglect, a person may telephone the department's toll-free child abuse and neglect hotline or contact a local department of jurisdiction pursuant to §63.2-1510 of the Code of Virginia.

1. The local department of jurisdiction that first receives a complaint or report of child abuse and/or neglect shall assume responsibility to ensure that a family assessment or an investigation is conducted.

2. A local department may ask another local department that is a local department of jurisdiction to assist in conducting the family assessment or investigation. If assistance is requested, the local department shall comply.

3. A local department may ask another local department through a cooperative agreement to assist in conducting the family assessment or investigation.

4. If a local department employee is suspected of abusing and/or neglecting a child, the complaint or report of child abuse and/or neglect shall be made to the

juvenile and domestic relations district court of the county or city where the alleged abuse and/or neglect was discovered. The judge shall assign the report to a local department that is not the employer of the subject of the report pursuant to §§63.2-1509 and 63.2-1510 of the Code of Virginia. The judge may consult with the department in selecting a local department to respond.

22VAC40-705-50. Actions to be taken upon receipt of a complaint or report.

A. All complaints and reports of suspected child abuse and/or neglect shall be recorded in the child abuse and neglect information system and either screened out or determined valid within 14 days of receipt. A record of all reports and complaints made to a local department or to the department, regardless of whether the report or complaint was found to be a valid complaint of abuse and/or neglect, shall be retained for one year from the date of the complaint.

B. In all valid complaints or reports of child abuse and/or neglect the local department of social services shall determine whether to conduct an investigation or a family assessment. A valid complaint or report is one in which:

1. The alleged victim child or children are under the age of 18 at the time of the complaint and/or report;

2. The alleged abuser is the alleged victim child's parent or other caretaker;

3. The local department receiving the complaint or report is a local department of jurisdiction; and

4. The circumstances described allege suspected child abuse and/or neglect.

C. The local department shall not conduct a family assessment or investigate complaints or reports of child abuse and/or neglect that fail to meet all of the criteria in subsection B of this section.

D. The local department shall report certain cases of suspected child abuse or neglect to the local attorney for the Commonwealth and the local law-enforcement agency pursuant to §63.2-1503 D of the Code of Virginia.

E. Pursuant to §63.2-1503 J of the Code of Virginia, local departments shall develop, where practical, memoranda of understanding for responding to reports of child abuse and neglect with local law enforcement and the local office of the commonwealth's attorney.

F. The local department shall report to the following when the death of a child is involved:

1. When abuse and/or neglect is suspected in any case involving the death of a child, the local department shall report the case immediately to the regional medical examiner pursuant to §63.2-1503 E of the Code of Virginia.

2. When abuse and/or neglect is suspected in any case involving the death of a child, the local department shall report the case immediately to the attorney for the Commonwealth and the local law-enforcement agency pursuant to §63.2-1503 D of the Code of Virginia.

3. The local department shall contact the department immediately upon receiving a complaint involving the death of a child and at the conclusion of the investigation.

4. The department shall immediately, upon receipt of information, report on all child fatalities to the state board in a manner consistent with department policy and procedures approved by the board. At a minimum, the report shall contain information regarding any prior statewide child protective services involvement of the family, alleged perpetrator, or victim.

G. Valid complaints or reports shall be screened for high priority based on the following:

1. The immediate danger to the child;

2. The severity of the type of abuse or neglect alleged;

3. The age of the child;

4. The circumstances surrounding the alleged abuse or neglect;

5. The physical and mental condition of the child; and

6. Reports made by mandated reporters.

H. The local department shall initiate an immediate response. The response shall be a family assessment or an investigation. Any valid report may be investigated, but in accordance with §63.2-1506 C of the Code of Virginia, those cases shall be investigated that involve: (i) sexual abuse, (ii) a child fatality, (iii) abuse or neglect resulting in a serious injury as defined in §18.2-371.1 of the Code of Virginia, (iv) a child having been taken into the custody of the local department of social services, or (v) a caretaker at a state-licensed child day care center, religiously exempt child day center, regulated family day home, private or public school, or hospital or any institution.

1. The purpose of an investigation is to collect the information necessary to determine or assess the following:

a. Immediate safety needs of the child;

b. Whether or not abuse or neglect has occurred;

c. Who abused or neglected the child;

d. To what extent the child is at risk of future harm, either immediate or longer term;

e. What types of services can meet the needs of this child or family; and

f. If services are indicated and the family appears to be unable or unwilling to participate in services, what alternate plans will provide for the child's safety.

2. The purpose of a family assessment is to engage the family in a process to collect the information necessary to determine or assess the following:

a. Immediate safety needs of the child;

b. The extent to which the child is at risk of future harm, either immediate or longer term;

c. The types of services that can meet the needs of this child or family; and

d. If services are indicated and the family appears to be unable or unwilling to participate in services, the plans that will be developed in consultation with the family to provide for the child's safety. These arrangements may be made in consultation with the caretaker(s) of the child.

3. The local department shall use reasonable diligence to locate any child for whom a report or complaint of suspected child abuse and/or neglect has been received and determined valid or persons who are the subject of a valid report if the whereabouts of such persons are unknown to the local department pursuant to §63.2-1503 F of the Code of Virginia.

4. The local department shall document its attempts to locate the child and family.

5. In the event the alleged victim child or children cannot be found, the time the child cannot be found shall not be computed as part of the 45-60-day time frame to complete the investigation, pursuant to subdivision 5 of §63.2-1505 of the Code of Virginia.

22VAC40-705-60. Authorities of local departments.

When responding to valid complaints or reports, local departments have the following authorities:

1. To talk to any child suspected of being abused and/or neglected, or child's siblings, without the consent of and outside the presence of the parent or other caretaker, as set forth by §63.2-1518 of the Code of Virginia.

2. To take or arrange for photographs and x-rays of a child who is the subject of a complaint without the consent of and outside the presence of the parent or other caretaker, as set forth in §63.2-1520 of the Code of Virginia.

3. To take a child into custody on an emergency removal for up to 72-96 hours under such circumstances as set forth in §63.2-1517 of the Code of Virginia.

a. A child protective services (CPS) worker planning to take a child into 72-96-hour emergency custody shall first consult with a supervisor. However, this requirement shall not delay action on the CPS worker's part if a supervisor cannot be contacted and the situation requires immediate action.

b. When circumstances warrant that a child be taken into emergency custody during a family assessment, the report shall be reassigned immediately to an investigation.

c. Any person who takes a child into custody pursuant to §63.2-1517 of the Code of Virginia shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent.

d. The local department shall have the authority to have a complete medical examination made of the child including a written medical

report and, when appropriate, photographs and x-rays pursuant to §63.2-1520 of the Code of Virginia.

e. When a child in 72-96-hour custody is in need of immediate medical or surgical treatment, the local director of social services or his designee(s) may consent to such treatment when the parent does not provide consent and a court order is not immediately obtainable.

f. When a child is not in the local department's custody, the local department cannot consent to medical or surgical treatment of the child.

g. When a child is removed, every effort must be made to obtain an emergency removal order within four hours. Reasons for not doing so shall be stated in the petition for an emergency removal order.

h. Every effort shall be made to provide notice of the removal in person to the parent or guardian as soon as practicable.

22VAC40-705-70. Collection of information.

A. When conducting an investigation the local department shall seek first-source information about the allegation of child abuse and/or neglect. When applicable, the local department shall include in the case record: police reports; depositions; photographs; physical, medical and psychological reports; and any tape recordings of interviews.

B. When completing a family assessment, the local department shall gather all relevant information in collaboration with the family, to the degree possible, in order to determine the child and family services needs related to current safety or future risk of harm to the child.

C. All information collected must be entered in the state automated system and maintained according to §63.2-1514 for unfounded investigations or family

assessments or according to 22VAC40-700-30 for founded investigations. The automated record entered in the statewide automation system is the official record. When documentation is not available in electronic form, it must be maintained in the hard copy portion of the record. Any hard copy information, including photographs and recordings, shall be noted as an addendum to the official record.

22VAC40-705-80. Family assessment and investigation contacts.

A. During the course of the family assessment, the child protective services (CPS) worker shall make and record the following contacts and observations.

1. The child protective services worker shall conduct a face-to-face interview with and observe the alleged victim child and siblings.

2. The child protective services worker shall conduct a face-to-face interview with the alleged victim child's parents or guardians and/or any caretaker named in the report.

3. The child protective services worker shall observe the family environment, contact pertinent collaterals, and review pertinent records in consultation with the family.

B. During the course of the investigation, the child protective services (CPS) worker shall make and record in writing in the state automated system the following contacts and observations. When any of these contacts or observations is not made, the CPS worker shall record in writing why the specific contact or observation was not made.

1. The child protective services worker shall conduct a face-to-face interview with and observation of the alleged victim child. All interviews with alleged victim children must be audio tape recorded except when the child protective services worker determines that:

a. The child's safety may be endangered by audio taping;

b. The age and/or developmental capacity of the child makes audio taping impractical;

c. A child refuses to participate in the interview if audio taping occurs; or

d. In the context of a team investigation with law-enforcement personnel, the team or team leader determines that audio taping is not appropriate.

In the case of an interview conducted with a nonverbal child where none of the above exceptions apply, it is appropriate to audio tape record the questions being asked by the child protective services worker and to describe, either verbally or in writing, the child's responses. A child protective services worker shall document in detail in the record and discuss with supervisory personnel the basis for a decision not to audio tape record an interview with the alleged victim child.

A child protective services finding may be based on the written narrative of the child protective services worker in cases where an audio recording is unavailable due to equipment failure or other cause.

2. The child protective services (CPS) worker shall conduct a face-to-face interview with the alleged abuser and/or neglector.

a. The CPS worker shall inform the alleged abuser and/or neglector of his right to tape record any communication pursuant to §63.2-1516 of the Code of Virginia.

b. The local department shall provide the necessary equipment in order to tape record the interview and retain a copy of the tape for the record.

3. The child protective services worker shall conduct a face-to-face interview with the alleged victim child's parents or guardians.

4. The child protective services worker shall observe the environment where the alleged victim child lives.

5. The child protective services worker shall observe the site where the alleged incident took place.

6. The child protective services worker shall conduct interviews with collaterals who have pertinent information relevant to the investigation and the safety of the child.

22VAC40-705-90. Family assessment and investigative protocol.

A. In conducting a family assessment or an investigation, the child protective services (CPS) worker may enter the home if permitted to enter by an adult person who resides in the home. Only in those instances where the CPS worker has probable cause to believe that the life or health of the child would be seriously endangered within the time it would take to obtain a court order or the assistance of a law-enforcement officer, may a CPS worker enter the home without permission. A child protective services worker shall document in detail in the record and discuss with supervisory personnel the basis for the decision to enter the house without permission.

B. Before conducting a family assessment or investigation, the child protective services worker shall explain the responsibilities and authorities of CPS so that the parent or other caretaker can be made aware of the possible benefits and consequences of completing the family assessment or investigation. The explanation must be provided orally and in writing.

C. The child protective services worker may transport a child without parental consent only when the local department has assumed custody of that child by

virtue of 72-96-hour removal authority pursuant to §63.2-1517 of the Code of Virginia, by an emergency removal court order pursuant to §16.1-251 of the Code of Virginia, or by a preliminary removal order pursuant to §16.1-252 of the Code of Virginia.

D. When a child protective services worker has reason to believe that the caretaker in a valid report of child abuse or neglect is abusing substances and such behavior may be related to the matter being investigated or assessed, the worker may request that person to consent to substance abuse screening or may petition the court to order such screening.

1. Local departments must develop guidelines for such screening.

2. Guidelines may include child protective services worker administration of urine screening.

22VAC40-705-100. Judicial proceedings.

A. A child protective services worker may petition for removal pursuant to §§16.1-251 and 16.1-252 of the Code of Virginia.

B. A child protective services worker may petition for a preliminary protective order pursuant to §16.1-253 of the Code of Virginia.

C. Whenever the local department assumes custody of a child under subsection A or B of this section, a child protective services worker shall petition the court for parental child support.

D. Any person who participates in a judicial proceeding resulting from making a child protective services report or complaint or from taking a child into custody pursuant to §§63.2-1509, 63.2-1510 and 63.2-1517 of the Code of Virginia shall be immune from any civil or criminal liability in connection therewith unless it is proven that such person acted in bad faith or with malicious intent pursuant to §63.2-1512 of the Code of Virginia.

22VAC40-705-110. Assessments in family assessments and investigations.

A. In both family assessments and investigations the child protective services worker shall conduct an initial assessment of the child's circumstances and threat of danger or harm, and where appropriate shall make a safety plan to provide for the protection of the child.

B. In all founded cases and in completed family assessments, the child protective services worker shall make a risk assessment to determine whether or not the child is in jeopardy of future abuse and/or neglect and whether or not intervention is necessary to protect the child.

C. In investigations, the child protective services worker shall make a dispositional assessment after collecting and synthesizing information about the alleged abuse or neglect.

22VAC40-705-120. Complete the family assessment or investigation.

A. The local department shall promptly notify the alleged abuser and/or neglector and the alleged victim's parents or guardians of any extension of the deadline for the completion of the family assessment or investigation pursuant to §63.2-1506 B 3 or subdivision 5 of §63.2-1505 of the Code of Virginia. The child protective services worker shall document the notifications and the reason for the need for additional time in the case record.

B. At the completion of the family assessment, the subject of the report shall be notified orally and in writing of the results of the assessment.

C. The subject of the report shall be notified immediately if during the course of completing the family assessment the situation is reassessed and determined to meet the requirements, as specified in §63.2-1506 B of the Code of Virginia, to be investigated.

D. When completing an investigation, prior to rendering a founded disposition concerning a complaint of child abuse and/or neglect, the local department shall provide an opportunity for the alleged abuser and/or neglector to have a local consultation with the local director or his designee to hear and refute the evidence supporting a founded disposition. Whenever a criminal charge is also filed against the alleged abuser for the same conduct involving the same victim child as investigated by the local department, sharing the evidence prior to the court hearing is prohibited.

1. The alleged abuser and/or neglector shall be afforded the opportunity to informally present testimony, witnesses or documentation to representatives of the local department.

2. The local department shall consider any evidence presented by the alleged abuser and/or neglector prior to rendering a disposition.

E. Local conference.

1. If the alleged abuser and/or neglector is found to have committed abuse or neglect, that alleged abuser and/or neglector may, within 30 days of being notified of that determination, submit a written request for an amendment of the determination and the local department's related records pursuant to §63.2-1526 A of the Code of Virginia. The local department shall conduct an informal conference in an effort to examine the local department's disposition and reasons for it and consider additional information about the investigation and disposition presented by the alleged abuser and/or neglector.

2. The local conference shall be conducted in accordance with 22VAC40-705-190.

22VAC40-705-130. Report family assessment or investigation conclusions.

A. Pursuant to §63.2-1514 of the Code of Virginia, the local department shall report all unfounded case dispositions to the child abuse and neglect information system when disposition is made.

1. The department shall retain unfounded complaints or reports in the child abuse and neglect information system to provide local departments with information regarding prior investigations.

2. This record shall be kept separate from the Central Registry and accessible only to the department and to local departments.

3. The record of the unfounded case shall be purged one year after the date of the complaint or report if there are no subsequent founded or unfounded complaints and/or reports regarding the individual against whom allegations of abuse and/or neglect were made or regarding the same child in that one year.

4. The record of the family assessment shall be purged three years after the date of the complaint or report if there are no subsequent complaints and/or reports regarding the individual against whom allegations of abuse and/or neglect were made or regarding the same child in those three years.

5. If the individual against whom allegations of abuse and/or neglect were made or if the same child is involved in subsequent complaints and/or reports, the information from all complaints and/or reports shall be maintained until the last purge date has been reached.

6. The individual against whom unfounded allegations of abuse and/or neglect were made may request in writing that the local department retain the record for an additional period of up to two years.

7. The individual against whom allegations of abuse and/or neglect were made may request in writing that both the local department and the department

shall immediately purge the record after a court rules that the report was made in bad faith or with malicious intent pursuant to §63.2-1514 of the Code of Virginia.

B. The local department shall report all founded case dispositions to the child abuse and neglect information system for inclusion in the Central Registry pursuant to subdivision 5 of §63.2-1505 of the Code of Virginia and 22VAC40-700-30. Identifying information about the abuser and/or neglector and the victim child or children reported include demographic information, type of abuse or neglect, and date of the complaint. The identifying information shall be retained based on the determined level of severity of the abuse or neglect pursuant to the regulation dealing with retention in the Central Registry, 22VAC40-700-30.

22VAC40-705-140. Notification of findings.

A. Upon completion of the investigation the local child protective services worker shall make notifications as provided in this section.

B. Individual against whom allegations of abuse and/or neglect were made.

1. When the disposition is unfounded, the child protective services worker shall inform the individual against whom allegations of abuse and/or neglect were made of this finding. This notification shall be in writing with a copy to be maintained in the case record. The individual against whom allegations of abuse and/or neglect were made shall be informed that he may have access to the case record and that the case record shall be retained by the local department for one year unless requested in writing by such individual that the local department retain the record for up to an additional two years.

a. If the individual against whom allegations of abuse and/or neglect were made or the subject child is involved in subsequent complaints, the information from all complaints shall be retained until the last purge date has been reached.

b. The local worker shall notify the individual against whom allegations of abuse and/or neglect were made of the procedures set forth in §63.2-1514 of the Code of Virginia.

c. When an unfounded investigation involves a child death, the child protective services worker shall inform the individual against whom allegations of abuse and/or neglect were made that the case record will be retained for the longer of 12 months or until the State Child Fatality Review Team has completed its review of the case pursuant to §32.1-283.1 D of the Code of Virginia.

2. When the abuser and/or neglector in a founded complaint is a foster parent of the victim child, the local department shall place a copy of this notification letter in the child's foster care record and in the foster home provider record.

3. No disposition of founded or unfounded shall be made in a family assessment. At the completion of the family assessment the subject of the report shall be notified orally and in writing of the results of the assessment.

C. Subject child's parents or guardian.

1. When the disposition is unfounded, the child protective services worker shall inform the parents or guardian of the subject child in writing, when they are not the individuals against whom allegations of child abuse and/or neglect were made, that the complaint involving their child was determined to be unfounded and the length of time the child's name and information about the case will be maintained. The child protective services worker shall file a copy in the case record.

2. When the disposition is founded, the child protective services worker shall inform the parents or guardian of the child in writing, when they are not the abuser and/or neglector, that the complaint involving their child was determined

to be founded and the length of time the child's name and information about the case will be retained in the Central Registry. The child protective services worker shall file a copy in the case record.

3. When the founded case of abuse or neglect does not name the parents or guardians of the child as the abuser or neglector and when the abuse or neglect occurred in a licensed or unlicensed day care center, a regulated family day home, a private or public school, a child-caring institution or a residential facility for juveniles, the parent or guardian must be consulted and must give permission for the child's name to be entered into the central registry pursuant to §63.2-1515 of the Code of Virginia.

D. Complainant.

1. When an unfounded disposition is made, the child protective services worker shall notify the complainant, when known, in writing that the complaint was investigated and determined to be unfounded. The worker shall file a copy in the case record.

2. When a founded disposition is made, the child protective services worker shall notify the complainant, when known, in writing that the complaint was investigated and necessary action was taken. The local worker shall file a copy in the case record.

3. When a family assessment is completed, the child protective services worker shall notify the complainant, when known, that the complaint was assessed and necessary action taken.

E. Family Advocacy Program. When a founded disposition is made, the child protective services worker shall notify the Family Advocacy Program representative in writing as set forth in 22VAC40-720-20.

22VAC40-705-150. Services.

A. At the completion of a family assessment or investigation, the local department shall consult with the family to provide or arrange for necessary protective and rehabilitative services to be provided to the child and his family to the extent funding is available pursuant to subdivision A 2 of §63.2-1505 or §63.2-1506 of the Code of Virginia.

B. Families may decline services offered as a result of family assessment. If the family declines services, the case shall be closed unless there is an existing court order or the local department determines that sufficient cause exists due to threat of harm or actual harm to the child to redetermine the case as one that needs to be investigated or brought to the attention of the court. In no instance shall these actions be taken solely because the family declines services.

C. At the completion of a family assessment or investigation, local departments of social services may petition the court for services deemed necessary.

D. Protective services also includes preventive services to children about whom no formal complaint of abuse or neglect has been made, but for whom potential harm or threat of harm exists, to be consistent with §§16.1-251, 16.1-252, 16.1-279.1, 63.2-1503 J, and 63.2-1502 of the Code of Virginia.

E. Local departments shall support the establishment and functioning of multidisciplinary teams pursuant to §63.2-1503 J of the Code of Virginia.

F. The local department must use reasonable diligence to locate any child for whom a founded disposition of abuse or neglect has been made and a child protective services case has been opened pursuant to §63.2-1503 F of the Code of Virginia. The local department shall document its attempts to locate the child and family.

G. When an abused or neglected child and persons who are the subject of an open child abuse services case have relocated out of the jurisdiction of the local department, the local department shall notify the child protective services agency in the jurisdiction to which such persons have relocated, whether inside or outside of the Commonwealth of Virginia, and forward to such agency relevant portions of the case records pursuant to §63.2-1503 G of the Code of Virginia.

H. The receiving local department shall arrange necessary protective and rehabilitative services pursuant to §63.2-1503 G of the Code of Virginia.

22VAC40-705-160. Releasing information.

A. In the following instances of mandatory disclosure the local department shall release child protective services information. The local department may do so without any written release.

1. Report to attorney for the Commonwealth and law enforcement pursuant to §63.2-1503 D of the Code of Virginia.

2. Report to the medical examiner's office pursuant to §§32.1-283.1 C and 63.2-1503 E F of the Code of Virginia.

3. If a court mandates disclosure of information from a child abuse and neglect case record, the local department must comply with the request. The local department may challenge a court action for the disclosure of the case record or any contents thereof. Upon exhausting legal recourse, the local department shall comply with the court order.

4. When a family assessment or investigation is completed, the child protective services worker shall notify the complainant/reporter that either a complaint/report is unfounded or that necessary action is being taken.

5. Any individual, including an individual against whom allegations of child abuse and/or neglect were made, may exercise his Privacy Protection Act (§2.2-

3800 et seq. of the Code of Virginia) rights to access personal information related to himself which is contained in the case record including, with the individual's notarized consent, a search of the Central Registry pursuant to §2.2-3704 of the Code of Virginia.

6. When the material requested includes personal information about other individuals, the local department shall be afforded a reasonable time in which to redact those parts of the record relating to other individuals.

7. Pursuant to the Child Abuse Prevention and Treatment Act, as amended (42 USC §5101 et seq.), and federal regulations (45 CFR Part 1340), the local department shall provide case-specific information about child abuse and neglect reports and investigations to citizen review panels when requested.

8. Pursuant to the Child Abuse Prevention and Treatment Act, as amended (42 USC §5101 et seq.), the department shall develop guidelines to allow for public disclosure in instances of child fatality or near fatality.

9. An individual's right to access information under the Privacy Protection Act is stayed during criminal prosecution pursuant to §2.2-3802 of the Code of Virginia.

10. The local department shall disclose and release to the United States Armed Forces Family Advocacy Program child protective services information as required pursuant to 22VAC40-720-20.

11. Child protective services shall, on request by the Division of Child Support Enforcement, supply information pursuant to §63.2-103 of the Code of Virginia.

12. The local department shall release child protective services information to a court appointed special advocate pursuant to §9.1-156 A of the Code of Virginia.

13. The local department shall release child protective services information to a court-appointed guardian ad litem pursuant to §16.1-266 E of the Code of Virginia.

B. The local department may use discretion in disclosing or releasing child protective services case record information, investigative and on-going services to parties having a legitimate interest when the local department deems disclosure to be in the best interest of the child. The local department may disclose such information without a court order and without a written release pursuant to §63.2-105 of the Code of Virginia.

C. The local department shall not release the identity of persons reporting incidents of child abuse or neglect, unless court ordered, in accordance with §63.2-1526 of the Code of Virginia, 42 USC §5101 et seq., and federal regulations (45 CFR Part 1340).

D. Prior to disclosing information to any individuals or organizations, and to be consistent with §63.2-104 of the Code of Virginia, pursuant to §63.2-1500 of the Code of Virginia, the local department must be satisfied that:

1. The information will be used only for the purpose for which it is made available;

2. Such purpose shall be related to the goal of child protective or rehabilitative services; and

3. The confidential character of the information will be preserved to the greatest extent possible.

22VAC40-705-170. Access to Central Registry.

A. The department will complete a search of the Central Registry upon request by a local department, upon receipt of a notarized signature of the

individual whose name is being searched authorizing release of such information or a court order specifying a search of the Central Registry.

B. When the name being searched is found in the Central Registry, the department shall contact the local department responsible for the investigation to verify the information.

22VAC40-705-180. Training.

A. The department shall implement a uniform training plan for child protective services workers. The plan shall establish minimum standards for all child protective services workers in the Commonwealth of Virginia.

B. Workers shall complete skills and policy training specific to child abuse and neglect investigations within the first year of their employment.

22VAC40-705-190. Appeals

A. Appeal is the process by which the abuser and/or neglector may request amendment of the record when the investigation into the complaint has resulted in a founded disposition of child abuse and/or neglect.

B. If the alleged abuser and/or neglector is found to have committed abuse or neglect, that alleged abuser and/or neglector may, within 30 days of being notified of that determination, submit a written request for an amendment of the determination and the local department's related records, pursuant to §63.2-1526 A of the Code of Virginia. The local department shall conduct an informal conference in an effort to examine the local department's disposition and reasons for it and consider additional information about the investigation and disposition presented by the alleged abuser and/or neglector. The local department shall notify the child abuse and neglect information system that an appeal is pending.

C. Whenever an appeal is requested and a criminal charge is also filed against the appellant for the same conduct involving the same victim child as

investigated by the local department, the appeal process shall be stayed until the criminal prosecution in circuit court is completed pursuant to §63.2-1526 C of the Code of Virginia. During such stay, the appellant's right of access to the records of the local department regarding the matter being appealed shall also be stayed. Once the criminal prosecution in circuit court has been completed, the local department shall advise the appellant in writing of his right to resume his appeal within the time frames provided by law and regulation pursuant to §63.2-1526 C of the Code of Virginia.

D. The local department shall conduct an informal, local conference and render a decision on the appellant's request to amend the record within 45 days of receiving the request. If the local department either refuses the appellant's request for amendment of the record as a result of the local conference, or if the local department fails to act within 45 days of receiving such request, the appellant may, within 30 days thereafter and in writing, request the commissioner for an administrative hearing pursuant to §63.2-1526 A of the Code of Virginia.

E. The appellant may request, in writing, an extension of the 45-day requirement for a specified period of time, not to exceed an additional 60 days. When there is an extension period, the 30-day time frame to request an administrative hearing from the Commissioner of the Department of Social Services shall begin on the termination of the extension period pursuant to §63.2-1526 A of the Code of Virginia.

F. Upon written request, the local department shall provide the appellant all information used in making its determination. Disclosure of the reporter's name or information which may endanger the well-being of a child shall not be released. The identity of collateral witnesses or any other person shall not be released if disclosure may endanger their life or safety. Information prohibited from being

disclosed by state or federal law or regulation shall not be released. In case of any information withheld, the appellant shall be advised of the general nature of the information and the reasons, of privacy or otherwise, that it is being withheld, pursuant to §63.2-1526 A of the Code of Virginia.

G. The director of the local department, or a designee of the director, shall preside over the local conference. With the exception of the director of the local department, no person whose regular duties include substantial involvement with child abuse and neglect cases shall preside over the local conference pursuant to §63.2-1526 A of the Code of Virginia.

1. The appellant may be represented by counsel pursuant to §63.2-1526 A of the Code of Virginia.

2. The appellant shall be entitled to present the testimony of witnesses, documents, factual data, arguments or other submissions of proof pursuant to §63.2-1526 A of the Code of Virginia.

3. The director of the local department, or a designee of the director, shall notify the appellant, in writing, of the results of the local conference within 45 days of receipt of the written request from the appellant unless the time frame has been extended as described in subsection E of this section. The director of the local department, or the designee of the director, shall have the authority to sustain, amend, or reverse the local department's findings. Notification of the results of the local conference shall be mailed, certified with return receipt, to the appellant. The local department shall notify the child abuse and neglect information system of the results of the local conference.

H. If the appellant is unsatisfied with the results of the local conference, the appellant may, within 30 days of receiving notice of the results of the local

conference, submit a written request to the commissioner for an administrative hearing pursuant to §63.2-1526 B of the Code of Virginia.

1. The commissioner shall designate a member of his staff to conduct the proceeding pursuant to §63.2-1526 B of the Code of Virginia.

2. A hearing officer shall schedule a hearing date within 45 days of the receipt of the appeal request unless there are delays due to subpoena requests, depositions or scheduling problems.

3. After a party's written motion and showing good cause, the hearing officer may issue subpoenas for the production of documents or to compel the attendance of witnesses at the hearing. The victim child and that child's siblings shall not be subpoenaed, deposed or required to testify, pursuant to §63.2-1526 B of the Code of Virginia.

4. Upon petition, the juvenile and domestic relations district court shall have the power to enforce any subpoena that is not complied with or to review any refusal to issue a subpoena. Such decisions may not be further appealed except as part of a final decision that is subject to judicial review pursuant to §63.2-1526 B of the Code of Virginia.

5. Upon providing reasonable notice to the other party and the hearing officer, a party may, at his own expense, depose a nonparty and submit that deposition at, or prior to, the hearing. The victim child and the child's siblings shall not be deposed. The hearing officer is authorized to determine the number of depositions that will be allowed pursuant to §63.2-1526 B of the Code of Virginia.

6. The local department shall provide the hearing officer a copy of the investigation record prior to the administrative hearing. By making a written request to the local department, the appellant may obtain a copy of the

investigation record. The appellant shall be informed of the procedure by which information will be made available or withheld from him.

In any case of information withheld, the appellant shall be advised of the general nature of the information and the reasons that it is being withheld pursuant to §63.2-1526 B of the Code of Virginia.

7. The appellant and the local department may be represented by counsel at the administrative hearing.

8. The hearing officer shall administer an oath or affirmation to all parties and witnesses planning to testify at the hearing pursuant to §63.2-1526 B of the Code of Virginia.

9. The local department shall have the burden to show that the preponderance of the evidence supports the founded disposition. The local department shall be entitled to present the testimony of witnesses, documents, factual data, arguments or other submissions of proof.

10. The appellant shall be entitled to present the testimony of witnesses, documents, factual data, arguments or other submissions of proof.

11. The hearing officer may allow either party to submit new or additional evidence at the administrative hearing if it is relevant to the matter being appealed.

12. The hearing officer shall not be bound by the strict rules of evidence. However, the hearing officer shall only consider that evidence, presented by either party, which is substantially credible or reliable.

13. The hearing officer may allow the record to remain open for a specified period of time, not to exceed 14 days, to allow either party to submit additional evidence unavailable for the administrative hearing.

14. In the event that new or additional evidence is presented at the administrative hearing, the hearing officer may remand the case to the local department for reconsideration of the findings. If the local department fails to act within 14 days or fails to amend the findings to the satisfaction of the appellant, then the hearing officer shall render a decision, pursuant to §63.2-1526 B of the Code of Virginia.

I. Within 60 days of the close of receiving evidence, the hearing officer shall render a written decision. The hearing officer shall have the authority to sustain, amend, or reverse the local department's findings. The written decision of the hearing officer shall state the findings of fact, conclusions based on regulation and policy, and the final disposition. The decision will be sent to the appellant by certified mail, return receipt requested. Copies of the decision shall be mailed to the appellant's counsel, the local department and the local department's counsel. The hearing officer shall notify the child abuse and neglect information system of the hearing decision. The local department shall notify all other prior recipients of the record of the findings of the hearing officer's decision.

J. The hearing officer shall notify the appellant of the appellant's further right of review in circuit court in the event that the appellant is not satisfied with the written decision of the hearing officer. Appeals are governed by Part 2A of the Rules of the Supreme Court of Virginia. The local department shall have no further right of review pursuant to §63.2-1526 B of the Code of Virginia.

K. In the event that the hearing officer's decision is appealed to circuit court, the department shall prepare a transcript for that proceeding. That transcript or narrative of the evidence shall be provided to the circuit court along with the complete hearing record. If a court reporter was hired by the appellant, the court reporter shall prepare the transcript and provide the court with a transcript.

Virginia Administrative Code - updated through July 1, 2008

Part I
Definitions

22VAC40-730-10. Definitions.

The following words and terms when used in conjunction with this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Caretaker," for the purpose of this chapter, means any individual determined to have the responsibility of caring for a child.

"Child day center" means a child day program operated in other than the residence of the provider or any of the children in care, responsible for the supervision, protection, and well-being of children during absence of a parent or guardian, as defined in §63.2-100 of the Code of Virginia. For the purpose of this chapter, the term shall be limited to include only state licensed child day centers and religiously exempted child day centers.

"Child Protective Services" means the identification, receipt and immediate investigation of complaints and reports of child abuse and neglect for children under 18 years of age. It also includes documenting, arranging for, and providing social casework and other services for the child, his family, and the alleged abuser.

"Complaint" means a valid report of suspected child abuse or neglect which must be investigated by the local department of social services.

"Department" means the Department of Social Services.

"Disposition" means the determination of whether abuse or neglect occurred.

"Facility" means the generic term used to describe the setting in out of family abuse or neglect and for the purposes of this regulation includes schools (public and private), private or state-operated hospitals or institutions, child day centers, state regulated family day homes, and residential facilities.

"Facility administrator" means the on-site individual responsible for the day-to-day operation of the facility.

"Family day home," for the purpose of this chapter, means a child day program as defined in §63.2-100 of the Code of Virginia where the care is provided in the provider's home and is state regulated; locally approved or regulated homes are not included in this definition.

"Founded" means that a review of the facts shows by a preponderance of the evidence that child abuse and/or neglect has occurred. A determination that a case is founded shall be based primarily on first source evidence; in no instance shall a determination that a case is founded be based solely on indirect evidence or an anonymous complaint.

"Local agency" means the local department of social services responsible for conducting investigations of child abuse or neglect complaints as per §63.2-1503 of the Code of Virginia.

"Participate" means to take part in the activities of the joint investigation as per a plan for investigation developed by the CPS worker with the facility administrator or regulatory authority or both.

"Physical plant" means the physical structure/premises of the facility.

"Regulatory authority" means the department or state board that is responsible under the Code of Virginia for the licensure or certification of a facility for children.

"Residential facility" means a publicly or privately owned facility, other than a private family home, where 24-hour care is provided to children separated from their legal guardians, that is subject to licensure or certification pursuant to the provisions of the Code of Virginia and includes, but is not limited to, group

homes, group residences, secure custody facilities, self-contained residential facilities, temporary care facilities, and respite care facilities.

Part II
Policy

22VAC40-730-20. General.

Complaints of child abuse or neglect involving caretakers in out of family settings are for the purpose of this chapter complaints in state licensed and religiously exempted child day centers, regulated family day homes, private and public schools, group residential facilities, hospitals or institutions. These complaints shall be investigated by qualified staff employed by local departments of social services or welfare.

Staff shall be determined to be qualified based on criteria identified by the department. All staff involved in investigating a complaint must be qualified.

This regulation is limited in scope to the topics contained herein. All issues regarding investigations, findings and appeals are found in Child Protective Services, 22VAC40-705, and as such are cross referenced and incorporated into and apply to out of family cases to the extent that they are not inconsistent with this regulation.

In addition to the authorities and the responsibilities specified in department policy for all child protective services investigations, the policy for investigations in out of family settings is set out in 22VAC40-730-30 through 22VAC40-730-130.

22VAC40-730-30. Initial assessment.

If the complaint information received is such that the local agency is concerned for the child's immediate safety, contact must be initiated with the facility administrator immediately to ensure the child's safety. If, in the judgment

of the child protective services/CPS worker, the situation is such that the child or children should be immediately removed from the facility, the parent or parents, guardian or agency holding custody shall be notified immediately to mutually develop a plan which addresses the child's or children's immediate safety needs.

22VAC40-730-40. Involvement of regulatory agencies.

The authority of the local agency to investigate complaints of alleged child abuse or neglect in regulated facilities overlaps with the authority of the public agencies which have regulatory responsibilities for these facilities to investigate alleged violations of standards.

1. For complaints in state regulated facilities and religiously exempted child day centers, the local agency shall contact the regulatory authority and share the complaint information. The regulatory authority will appoint a staff person to participate in the investigation to determine if there are regulatory concerns.

2. The CPS worker assigned to investigate and the appointed regulatory staff person will discuss their preliminary joint investigation plan.

a. The CPS worker and the regulatory staff person shall review their respective needs for information and plan the investigation based on when these needs coincide and can be met with joint interviews or with information sharing.

b. The investigation plan must keep in focus the policy requirements to be met by each party as well as the impact the investigation will have on the facility's staff, the victim child or children, and the other children at the facility.

22VAC40-730-50. Involvement of other parties.

A. In a facility for which there is not a state regulatory authority, such as in schools, the CPS worker shall ask the facility administrator or school

superintendent to designate a person to participate in the joint investigative process.

B. When CPS and law enforcement will be conducting a joint investigation, the CPS worker shall attempt to facilitate a coordinated approach among CPS, law enforcement and the regulatory authority or facility designee.

22VAC40-730-60. Contact with CPS regional coordinator.

A. The local agency shall contact the department's regional CPS coordinator as soon as is practical after the receipt of the complaint. The regional coordinator will review the procedures to be used in investigating the complaint and provide any case planning assistance the local worker may need.

B. The regional coordinator shall be responsible for monitoring the investigative process and shall be kept informed of developments which substantially change the original case plan.

C. At the conclusion of the investigation the local agency shall contact the department's regional CPS coordinator to review the case prior to notifying anyone of the disposition. The regional coordinator shall review the facts gathered and policy requirements for determining whether or not abuse or neglect occurred. However, the statutory authority for the disposition rests with the local agency. This review shall not interfere with the requirement to complete the investigation in the legislatively mandated time frame.

22VAC40-730-70. Contact with the facility administrator.

A. The CPS worker shall initiate contact with the facility administrator at the onset of the investigation.

B. The CPS worker shall inform the facility administrator or his designee of the details of the complaint. When the administrator or designee chooses to participate in the joint investigation, he will be invited to participate in developing

the plan for investigation, including decisions about who is to be present in interviews. If the administrator or designee is the alleged abuser or neglector, this contact should be initiated with the individual's superior, which may be the board of directors, etc. If there is no superior, the CPS worker may use discretion in sharing information with the administrator.

C. Arrangements are to be made for:

1. Necessary interviews;

2. Observations including the physical plant; and

3. Access to information, including review of pertinent policies and procedures.

D. The CPS worker shall keep the facility administrator apprised of the progress of the investigation. In a joint investigation with a regulatory staff person, either party may fulfill this requirement.

22VAC40-730-80. Contact with the alleged victim child.

The CPS worker shall interview the alleged victim child and shall determine along with a regulatory staff person or facility administrator or designee who may be present in the interview. Where there is an apparent conflict of interest, the CPS agency shall use discretion regarding who is to be included in the interview.

22VAC40-730-90. Contact with the alleged abuser or neglector.

A. The CPS worker shall interview the alleged abuser or neglector according to a plan developed with the regulatory staff person, facility administrator, or designee. Where there is an apparent conflict of interest, the CPS agency shall use discretion regarding who is to be included in the interview. At the onset of the initial interview with the alleged abuser or neglector, the CPS worker shall notify

him in writing of the general nature of the complaint and the identity of the alleged victim child to avoid any confusion regarding the purpose of the contacts.

B. The alleged abuser or neglector has the right to involve a representative of his choice to be present during his interviews.

22VAC40-730-100. Contact with collateral children.

The CPS worker shall interview nonvictim children as collaterals if it is determined that they may have information which would help in determining the finding in the complaint. Such contact should be made with prior consent of the child's parent, guardian or agency holding custody. If the situation warrants contact with the child prior to such consent being obtained, the parent, guardian or agency holding custody should be informed as soon as possible after the interview takes place.

22VAC40-730-110. Report the findings.

Written notification of the findings shall be submitted to the facility administrator and the regulatory staff person involved in the investigation, if applicable, at the same time the alleged abuser or neglector is notified.

If the facility administrator is the abuser or neglector, written notification of the findings shall be submitted to his superior if applicable.

22VAC40-730-115. Procedures for conducting an investigation of a teacher, principal or other person employed by a local school board or employed in a nonresidential school operated by the Commonwealth.

A. Each local department of social services and local school division shall adopt a written interagency agreement as a protocol for investigating child abuse and neglect reports against school personnel. The interagency agreement shall be based on recommended procedures for conducting investigations developed by the Departments of Education and Social Services.

B. These procedures for investigating school personnel amplify or clarify other Child Protection Services (CPS) regulations.

1. In determining the validity of a report of suspected abuse or neglect pursuant to §63.2-1511 of the Code of Virginia, the local department must consider whether the school employee used reasonable and necessary force. The use of reasonable and necessary force does not constitute a valid report.

2. The local department shall conduct a face-to-face interview with the person who is the subject of the complaint or report.

3. At the onset of the initial interview with the alleged abuser or neglector, the local department shall notify him in writing of the general nature of the complaint and the identity of the alleged child victim regarding the purpose of the contacts.

4. The written notification shall include the information that the alleged abuser or neglector has the right to have an attorney or other representative of his choice present during his interviews. However, the failure by a representative of the Department of Social Services to so advise the subject of the complaint shall not cause an otherwise voluntary statement to be inadmissible in a criminal proceeding.

5. If the local department determines that the alleged abuser's actions were within the scope of his employment and were taken in good faith in the course of supervision, care or discipline of students, then the standard for determining a founded finding of abuse or neglect is whether such acts or omissions constituted gross negligence or willful misconduct.

6. Written notification of the findings shall be submitted to the alleged abuser or neglector. The notification shall include a summary of the investigation and an explanation of how the information gathered supports the disposition.

7. The written notification of the findings shall inform the alleged abuser or neglector of his right to appeal.

8. The written notification of the findings shall inform the alleged abuser or neglector of his right to review information about himself in the record with the following exceptions:

a. The identity of the person making the report.

b. Information provided by any law-enforcement official.

c. Information that may endanger the well-being of the child.

d. The identity of a witness or any other person if such release may endanger the life or safety of such witness or person.

No information shall be released by the local department in cases that are being criminally investigated unless the release is authorized by the investigating law-enforcement officer or his supervisor or the local attorney for the Commonwealth.

22VAC40-730-120. Monitoring of cases for compliance.

A sample of cases will be reviewed by department staff to ensure compliance with policies and procedures.

Article 2

22VAC40-730-130. Requirements.

A. In order to be determined qualified to conduct investigations in out of family settings, local CPS staff shall meet minimum education standards established by the department including:

1. Documented competency in designated general knowledge and skills and specified out of family knowledge and skills; and

2. Completion of out of family policy training.

B. The department and each local agency shall maintain a roster of personnel determined qualified to conduct these out of family investigations.

Virginia Administrative Code - updated through July 1, 2008

22VAC40-720-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

"Abuser/neglector" means any person who is the subject of a complaint and is suspected of or is found to have committed the abuse or neglect of a child pursuant to Chapter 15 (§63.2-1500 et seq.) of Title 63.2 of the Code of Virginia.

"Administrative appeal rights" means the child protective services appeals procedures for a local level informal conference and a state level hearing pursuant to Chapter 15 (§63.2-1500 et seq.) of Title 63.2 of the Code of Virginia, under which an individual who is suspected of or is found to have committed abuse or neglect may request that the Department of Social Services' records be amended.

"Child protective services" means the identification, receipt and immediate investigation of complaints and reports of child abuse and neglect for children under 18 years of age. It also includes documenting, arranging for, and providing social casework and other services for the child, his family, and the alleged abuser or neglector.

"Complaint" means a valid report of suspected child abuse or neglect which must be investigated by the local department of social services.

"Family Advocacy Program representative" means the professional employed by the United States Armed Forces who has responsibility for the program which is designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up and reporting of family violence.

"Founded" means that a review of the facts shows a preponderance of evidence that child abuse or neglect has occurred.

"Investigation" means the formal fact-finding process utilized by the local department of social services in determining whether or not abuse or neglect has occurred. This process is employed for each valid complaint received by the local department.

"Report" means any information transmitted to the local department of social services relating the suspicion of possible abuse or neglect of a child pursuant to Chapter 15 (§63.2-1500 et seq.) of Title 63.2 of the Code of Virginia.

22VAC40-720-20. Release of information.

A. Information regarding child protective services reports, complaints, investigations and related services and follow-up may be shared with the appropriate Family Advocacy Program representative of the United States Armed Forces when the local agency determines such release to be in the best interest of the child. Provision of information as addressed in this chapter shall apply to instances where the alleged abuser or neglector is a member (or the spouse of a member) of the United States Armed Forces. In these situations coordination between child protective services and the Family Advocacy Program is intended to facilitate identification, treatment and service provision to the military family.

B. In founded complaints in which the abuser or neglector is an active duty member of the United States Armed Forces, or the spouse of a member residing in the member's household, information regarding the disposition, type of abuse or neglect, and the identity of the abuser or neglector shall be provided to the appropriate Family Advocacy Program representative. This notification shall be made in writing within 30 days after administrative appeal rights of the abuser or neglector have been exhausted or forfeited.

The military member shall be advised that this information is being provided and shall be given a copy of the written notification sent to the Family Advocacy Program representative.

When needed by the Family Advocacy Program representative to facilitate treatment and service provision to the military family, additional related information shall also be provided to the Family Advocacy Program representative.

Child Abuse Prevention and Treatment Act as Amended by the Keeping Children and Families Safe Act of 2003

SECTION I: CHILD ABUSE PREVENTION AND TREATMENT ACT

SEC. 106. GRANTS TO STATES FOR CHILD ABUSE AND NEGLECT PREVENTION AND TREATMENT PROGRAMS. [42 U.S.C. 5106a]

[This section was amended by sec. 114 of P.L. 108-36.]

a. DEVELOPMENT AND OPERATION GRANTS.—The Secretary shall make grants to the States, based on the population of children under the age of 18 in each State that applies for a grant under this section, for purposes of assisting the States in improving the child protective services system of each such State in—

1. the intake, assessment, screening, and investigation of reports of abuse and neglect;

   A. creating and improving the use of multidisciplinary teams and interagency protocols to enhance investigations; and
   B. improving legal preparation and representation, including—

      i. procedures for appealing and responding to appeals of substantiated reports of abuse and neglect; and
      ii. provisions for the appointment of an individual appointed to represent a child in judicial proceedings;

3. case management, including ongoing case monitoring, and delivery of services and treatment provided to children and their families;
4. enhancing the general child protective system by developing, improving, and implementing risk and safety assessment tools and protocols;
5. developing and updating systems of technology that support the program and track reports of child abuse and neglect from intake through final disposition and allow interstate and intrastate information exchange;
6. developing, strengthening, and facilitating training including—

   A. training regarding research-based strategies to promote collaboration with the families;
   B. training regarding the legal duties of such individuals; and
   C. personal safety training for case workers;

7. improving the skills, qualifications, and availability of individuals providing services to children and families, and the supervisors of such individuals, through the child protection system, including improvements in the recruitment and retention of caseworkers;
8. developing and facilitating training protocols for individuals mandated to report child abuse or neglect;
9. developing and facilitating research-based strategies for training individuals mandated to report child abuse or neglect;
10. developing, implementing, or operating programs to assist in obtaining or coordinating necessary

services for families of disabled infants with life-threatening conditions, including—

A. existing social and health services;
B. financial assistance; and
C. services necessary to facilitate adoptive placement of any such infants who have been relinquished for adoption.

11. developing and delivering information to improve public education relating to the role and responsibilities of the child protection system and the nature and basis for reporting suspected incidents of child abuse and neglect;
12. developing and enhancing the capacity of community-based programs to integrate shared leadership strategies between parents and professionals to prevent and treat child abuse and neglect at the neighborhood level;
13. supporting and enhancing interagency collaboration between the child protection system and the juvenile justice system for improved delivery of services and treatment, including methods for continuity of treatment plan and services as children transition between systems; or
14. supporting and enhancing collaboration among public health agencies, the child protection system, and private community-based programs to provide child abuse and neglect prevention and treatment services (including linkages with education systems) and to address the health needs, including mental health needs, of children identified as abused or neglected, including supporting prompt, comprehensive health and developmental evaluations for children who are the subject of substantiated child maltreatment reports.

b. ELIGIBILITY REQUIREMENTS.—

1. STATE PLAN.—

A. IN GENERAL.—To be eligible to receive a grant under this section, a State shall, at the time of the initial grant application and every 5 years thereafter, prepare and submit to the Secretary a State plan that specifies the areas of the child protective services system described in subsection (a) of this section that the State intends to address with amounts received under the grant.
B. ADDITIONAL REQUIREMENT.—After the submission of the initial grant application under subparagraph (A), the State shall provide notice to the Secretary—

i. of any substantive changes; and
ii. any significant changes to how funds provided under this section are used to support the activities which may differ from the activities as described in the current State application.

2. COORDINATION.—A State plan submitted under paragraph (1) shall, to the maximum extent practicable, be coordinated with the State plan under part B of title IV of the Social Security Act [42 U.S.C. 620 et seq.] relating to child welfare services and family preservation and family support services, and shall contain an outline of the activities that the State intends to carry out using amounts received under the grant to achieve the purposes of this title, including—

A. an assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes—

i. provisions or procedures for the reporting of known and suspected instances of child abuse and neglect;
ii. policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services) to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure, including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition of such infants, except that such notification shall not be construed to—

I. establish a definition under Federal law of what constitutes child abuse; or
II. require prosecution for any illegal action.

iii. the development of a plan of safe care for the infant born and identified as being affected by illegal substance abuse or withdrawal symptoms;

iv. procedures for the immediate screening, risk and safety assessment, and prompt investigation of such reports;
v. triage procedures for the appropriate referral of a child not at risk of imminent harm to a community organization or voluntary preventive service;
vi. procedures for immediate steps to be taken to ensure and protect the safety of the abused or neglected child and of any other child under the same care who may also be in danger of abuse or neglect and ensuring their placement in a safe environment;
vii. provisions for immunity from prosecution under State and local laws and regulations for individuals making good faith reports of suspected or known instances of child abuse or neglect;
viii. methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians, including requirements ensuring that reports and records made and maintained pursuant to the purposes of this title shall only be made available to—

I. individuals who are the subject of the report;
II. Federal, State, or local government entities, or any agent of such entities, as described in clause (ix);
III. child abuse citizen review panels;
IV. child fatality review panels;
V. a grand jury or court, upon a finding that information in the record is necessary for the determination of an issue before the court or grand jury; and
VI. other entities or classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate State purpose;

ix. provisions to require a State to disclose confidential information to any Federal, State, or local government entity, or any agent of such entity, that has a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect;
x. provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality;
xi. the cooperation of State law enforcement officials, court of competent jurisdiction, and appropriate State agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse or neglect;
xii. provisions requiring, and procedures in place that facilitate the prompt expungement of any records that are accessible to the general public or are used for purposes of employment or other background checks in cases determined to be unsubstantiated or false, except that nothing in this section shall prevent State child protective services agencies from keeping information on unsubstantiated reports in their casework files to assist in future risk and safety assessment;
xiii. provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—

I. to obtain first-hand, a clear understanding of the situation and needs of the child; and
II. to make recommendations to the court concerning the best interests of the child;

xiv. the establishment of citizen review panels in accordance with subsection (c);
xv. provisions, procedures, and mechanisms—

I. for the expedited termination of parental rights in the case of any infant determined to be abandoned under State law; and
II. by which individuals who disagree with an official finding of abuse or neglect can appeal such finding;

xvi. provisions, procedures, and mechanisms that assure that the State does not require reunification of a surviving child with a parent who has been found by a court of competent jurisdiction—

I. to have committed murder (which would have been an offense under section

1111(a) of title 18 if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of such parent;

II. to have committed voluntary manslaughter (which would have been an offense under section 1112(a) of title 18 if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of such parent;

III. to have aided or abetted, attempted, conspired, or solicited to commit such murder or voluntary manslaughter; or

IV. to have committed a felony assault that results in the serious bodily injury to the surviving child or another child of such parent;

xvii. an assurance that, upon the implementation by the State of the provisions, procedures, and mechanisms under clause (xvi), conviction of any one of the felonies listed in clause (xvi) constitute grounds under State law for the termination of parental rights of the convicted parent as to the surviving children (although case-by-case determinations of whether or not to seek termination of parental rights shall be within the sole discretion of the State);

xviii. provisions and procedures to require that a representative of the child protective services agency shall, at the initial time of contact with the individual subject to a child abuse and neglect investigation, advise the individual of the complaints or allegations made against the individual, in a manner that is consistent with laws protecting the rights of the informant;

xix. provisions addressing the training of representatives of the child protective services system regarding the legal duties of the representatives, which may consist of various methods of informing such representatives of such duties, in order to protect the legal rights and safety of children and families from the initial time of contact during investigation through treatment;

xx. provisions and procedures for improving the training, retention, and supervision of caseworkers;

xxi. provisions and procedures for referral of a child under the age of 3 who is involved in a substantiated case of child abuse or neglect to early intervention services funded under part C of the Individuals with Disabilities Education Act; and

xxii. not later than 2 years after the date of the enactment of the Keeping Children and Families Safe Act of 2003, provisions and procedures for requiring criminal background checks for prospective foster and adoptive parents and other adult relatives and non-relatives residing in the household.

B. an assurance that the State has in place procedures for responding to the reporting of medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions), procedures or programs, or both (within the State child protective services system), to provide for—

i. coordination and consultation with individuals designated by and within appropriate health-care facilities;

ii. prompt notification by individuals designated by and within appropriate health-care facilities of cases of suspected medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions); and

iii. authority, under State law, for the State child protective services system to pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, as may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life threatening conditions;

C. a description of—

i. the services to be provided under the grant to individuals, families, or communities, either directly or through referrals aimed at preventing the occurrence of child abuse and neglect;

ii. the training to be provided under the grant to support direct line and supervisory personnel in report taking, screening, assessment, decision making, and referral for investigating suspected instances of child abuse and neglect; and

iii. the training to be provided under the grant for individuals who are required to report suspected cases of child abuse and neglect; and

D. an assurance or certification that the programs or projects relating to child abuse and neglect carried out under part B of title IV of the Social Security Act [42 U.S.C. 620 et seq.] comply with the requirements set forth in paragraph (1) and this paragraph. Nothing in subparagraph (A) shall be construed to limit the State's flexibility to determine State policies relating to public access to court proceedings to determine child abuse and neglect, except that such policies shall, at a minimum, ensure the safety and well-being of the child, parents, and families.

3. LIMITATION.—With regard to clauses (vi) and (vii) of paragraph (2)(A), nothing in this section shall be construed as restricting the ability of a State to refuse to disclose identifying information concerning the individual initiating a report or complaint alleging suspected instances of child abuse or neglect, except that the State may not refuse such a disclosure where a court orders such disclosure after such court has reviewed, in camera, the record of the State related to the report or complaint and has found it has reason to believe that the reporter knowingly made a false report.
4. DEFINITIONS.—For purposes of this subsection—

A. the term "near fatality" means an act that, as certified by a physician, places the child in serious or critical condition; and
B. the term "serious bodily injury" means bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

c. CITIZEN REVIEW PANELS.—

1. ESTABLISHMENT.—

A. IN GENERAL.—Except as provided in subparagraph (B), each State to which a grant is made under this section shall establish not less than 3 citizen review panels.
B. EXCEPTIONS.—

i. ESTABLISHMENT OF PANELS BY STATES RECEIVING MINIMUM ALLOTMENT.—A State that receives the minimum allotment of $175,000 under section 203(b)(1)(A) [42 U.S. C. 5116(b)(1)(A)] of this title for a fiscal year shall establish not less than 1 citizen review panel.
ii. DESIGNATION OF EXISTING ENTITIES.—A State may designate as panels for purposes of this subsection one or more existing entities established under State or Federal law, such as child fatality panels or foster care review panels, if such entities have the capacity to satisfy the requirements of paragraph (4) and the State ensures that such entities will satisfy such requirements.

2. MEMBERSHIP.—Each panel established pursuant to paragraph (1) shall be composed of volunteer members who are broadly representative of the community in which such panel is established, including members who have expertise in the prevention and treatment of child abuse and neglect.
3. MEETINGS.—Each panel established pursuant to paragraph (1) shall meet not less than once every 3 months.
4. FUNCTIONS.—

A. IN GENERAL.—Each panel established pursuant to paragraph (1) shall, by examining the policies, procedures, and practices of State and local agencies and where appropriate, specific cases, evaluate the extent to which State and local child protection system agencies are effectively discharging their child protection responsibilities in accordance with—

i. the State plan under subsection (b) of this section;
ii. the child protection standards set forth in subsection (b) of this section; and
iii. any other criteria that the panel considers important to ensure the protection of children, including—

I. a review of the extent to which the State and local child protective services system is coordinated with the foster care and adoption programs established under part E of title IV of the Social Security Act [42 U.S.C. 670 et seq.]; and
II. a review of child fatalities and near fatalities (as defined in subsection (b)(4) [of this section]).

B. CONFIDENTIALITY.—

i. IN GENERAL.—The members and staff of a panel established under paragraph (1)—

I. shall not disclose to any person or government official any identifying information about any specific child protection case with respect to which the panel is provided information; and
II. shall not make public other information unless authorized by State statute.

ii. CIVIL SANCTIONS.—Each State that establishes a panel pursuant to paragraph (1) shall establish civil sanctions for a violation of clause (i).

C. PUBLIC OUTREACH.—Each panel shall provide for public outreach and comment in order to assess the impact of current procedures and practices upon children and families in the community and in order to meet its obligations under subparagraph (A).

5. STATE ASSISTANCE.—Each State that establishes a panel pursuant to paragraph (1)—

A. shall provide the panel access to information on cases that the panel desires to review if such information is necessary for the panel to carry out its functions under paragraph (4); and
B. shall provide the panel, upon its request, staff assistance for the performance of the duties of the panel.

6. REPORTS.—Each panel established under paragraph (1) shall prepare and make available to the State and the public, on an annual basis, a report containing a summary of the activities of the panel and recommendations to improve the child protection services system at the State and local levels. Not later than 6 months after the date on which a report is submitted by the panel to the State, the appropriate State agency shall submit a written response to State and local child protection systems and the citizen review panel that describes whether or how the State will incorporate the recommendations of such panel (where appropriate) to make measurable progress in improving the State and local child protection system.

d. ANNUAL STATE DATA REPORTS.—Each State to which a grant is made under this section shall annually work with the Secretary to provide, to the maximum extent practicable, a report that includes the following:

1. The number of children who were reported to the State during the year as abused or neglected.
2. Of the number of children described in paragraph (1), the number with respect to whom such reports were—

A. substantiated;
B. unsubstantiated; or
C. determined to be false.

3. Of the number of children described in paragraph (2)—

A. the number that did not receive services during the year under the State program funded under this section or an equivalent State program;
B. the number that received services during the year under the State program funded under this section or an equivalent State program; and
C. the number that were removed from their families during the year by disposition of the case.

4. The number of families that received preventive services from the State during the year.
5. The number of deaths in the State during the year resulting from child abuse or neglect.
6. Of the number of children described in paragraph (5), the number of such children who were in foster care.
7. The number of child protective services workers responsible for the intake and screening of reports filed in the previous year.
8. The agency response time with respect to each such report with respect to initial investigation of reports of child abuse or neglect.
9. The response time with respect to the provision of services to families and children where an allegation of abuse or neglect has been made.
10. The number of child protective services workers responsible for intake, assessment, and investigation of child abuse and neglect reports relative to the number of reports investigated in the previous year.
11. The number of children reunited with their families or receiving family preservation services that, within five years, result in subsequent substantiated reports of child abuse and neglect, including the death of the child.
12. The number of children for whom individuals were appointed by the court to represent the best

interests of such children and the average number of out of court contacts between such individuals and children.

13. The annual report containing the summary of activities of the citizen review panels of the State required by subsection (c)(6).
14. The number of children under the care of the State child protection system who are transferred into the custody of the State juvenile justice system.

e. ANNUAL REPORT BY SECRETARY.—Within 6 months after receiving the State reports under subsection (d) of this section, the Secretary shall prepare a report based on information provided by the States for the fiscal year under such subsection and shall make the report and such information available to the Congress and the national clearinghouse for information relating to child abuse.

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COURT OF APPEALS OF VIRGINIA

Present: Judges Bumgardner, Clements and McClanahan
Argued at Richmond, Virginia

MAURICE A. JONES, COMMISSIONER,
VIRGINIA DEPARTMENT OF SOCIAL SERVICES

v. Record No. 2144-04-2

OPINION BY
JUDGE JEAN HARRISON CLEMENTS
AUGUST 9, 2005

TOMMIE J. WEST

FROM THE CIRCUIT COURT OF CHESTERFIELD COUNTY
Michael C. Allen, Judge

A. Cameron O'Brion, Assistant Attorney General (Jerry W. Kilgore, Attorney General; David E. Johnson, Deputy Attorney General; Kim F. Piner, Senior Assistant Attorney General, on briefs), for appellant.

Gail H. Miller (Gail Harrington Miller, P.C., on brief), for appellee.

Maurice A. Jones, Commissioner (Commissioner) of the Virginia Department of Social Services (DSS), appeals from a decision of the Circuit Court of Chesterfield County (circuit court) setting aside and ordering the dismissal of a child protective services founded complaint of sexual abuse against Tommie J. West because the Chesterfield/Colonial Heights Department of Social Services (local department) failed to comply with certain procedural requirements in its investigation of the complaint. The Commissioner contends the circuit court erred (1) in determining that the local department's decision not to tape record its interview with the alleged victim constituted a procedural violation, (2) in concluding that the local department's procedural violations were not mere harmless error, and (3) in ordering the dismissal of the complaint against West instead of remanding the case to the hearing officer for further

adjudication. On cross-appeal, West contends the circuit court erred in failing to award him attorney's fees and costs. For the reasons that follow, we affirm the circuit court's judgment.

I. BACKGROUND

On March 29, 2002, the child protective services unit of the local department received a complaint alleging that S.J., a fourteen-year-old girl, may have been sexually abused by West, a friend of S.J.'s family, while she was in West's care. In response, Jami K. Robinson, a social worker with the local department, and Detective Rick Meadows of the Chesterfield County Police Department conducted a joint investigation of the complaint against West.

Detective Meadows and Robinson interviewed S.J. at the local department office that same day. The interview was not tape recorded. On April 2, 2002, Meadows interviewed West at the police station while Robinson observed from another room. The interview was not tape recorded, and West was not informed of his right to tape record the interview. At the conclusion of the interview, Robinson entered the interview room, introduced herself to West, gave him written notification of the complaint of sexual abuse lodged against him, and explained that she was conducting the child protective services investigation on behalf of the local department. Based on the interviews with S.J. and West, Robinson issued a disposition of "Founded, Level 1, sexual abuse" against West, on May 20, 2002.

Following a stay for the resolution of a related criminal charge,[1] a conference appeal was held by the local department on July 24, 2002. By letter dated August 8, 2002, the local department upheld the founded disposition.

West appealed the decision to the Commissioner, arguing, *inter alia*, that the local department's failure to comply with certain procedural requirements during the investigation

[1] West entered a plea of *nolo contendere* to the charge of misdemeanor assault and battery, Code § 18.2-57, and the juvenile and domestic relations district court deferred disposition of the charge for two years.

rendered the founded disposition invalid and that the investigatory evidence obtained by the local department did not support the founded disposition. Specifically, West argued the record did not show that West had the requisite "intent to sexually molest, arouse or gratify" when he touched S.J. in what he claimed was a "playful and friendly" manner or that S.J. suffered serious harm as a result of the touching. The administrative hearing officer designated by the Commissioner to hear the appeal conducted an evidentiary hearing on March 27, 2003. The local department's investigative record was made a part of the hearing record.

Robinson's account of the March 29, 2002 interview with S.J., which was included in the investigative record, read as follows:

> [S.J.] stated that Tomm[ie] West is about 70 years old, and is married, and used to be their next-door neighbor. She calls him Grandpa and has known him since 1997. She stated that nothing had happened before this school year and the last incident was on Thursday (the previous day). [S.J.] reported that [West] would put his hand high up on her leg and she told him to stop, that she didn't like it. This would occur in the car and was an every day thing. He would grab her whole leg, up near the crease, where her leg meets her hip, and sometimes his fingers would brush against her genitals. This always occurred over her clothes, not under them. [West] will often ask her for a hug before he leaves and he has grabbed the bottom of her butt and lifted her off the ground. He then holds her against him for 35 seconds, until she asks him to let her go. This has happened 3 times, the last time being last Friday. [S.J.] stated that he tells her how pretty she is, "like the girls in magazines." When [S.J.] would tell [West] that she didn't like it, he would say to her, "You don't love me any more," and act disappointed. [S.J.] stated that sometimes, while they were in the car, he would reach over and rub her chest, not her breasts, but her upper chest, near her neck, with the palm of his hand. If she were wearing a lower cut shirt, he would touch skin sometimes. [S.J.] stated that she has to physically remove his hand from her and he says to her that he would never do anything to offend her. The last time that this happened was last week. [S.J.] stated, when asked, that sometimes he brushes her breasts, but not every time. [West] has never asked her to touch him in any way. [S.J.] reported that [West] has said to her that he wants to see her naked before he dies. When this happens, it is sort of a random comment, with nothing leading up to it. He has also asked to see her underwear and he asks her often what color they are.

> However, one time [West] brought her over a birthday cake, and she had on some low cut jeans, and her underwear was showing a little bit. [S.J.] stated that [West] came over to her and pulled her underwear up so that he could look at them (she thought he was joking with her and giving her a wedgie). He commented on how pretty they were, and went on and on about them. [S.J.], when asked, speculated that all of this just started happening because of the opportunity, he hasn't had any prior to this year. [S.J.] mentioned one more thing that she thought was inappropriate—[West] once said to her that he liked to see her roll around on his floor with her skirt pulled above her head when she was little. [S.J.] thought that was weird.

Robinson's account of Detective Meadows's April 2, 2002 interview with West, also a part of the investigative record, read as follows:

> Mr. West stated that he has known the family for a while now and he figured he'd been running errands for them for 6 years. He stated that sometimes he would reach over in the car and hit [S.J.] on the leg jokingly, but never really high up on her leg. He stated that he would never do anything to [S.J.] or [her sister], he thinks of them as his own kids. Mr. West stated that he has pinched her on the leg in a playful manner, but he has never touched her on her privates, because he's "too old to even think anything." Mr. West stated that sometimes they hold hands, but he has never touched her breasts. He stated he has stroked her face before and grabbed her chin, but nothing further. . . . When asked specifically about grabbing [S.J.'s] underwear, Mr. West stated that he hasn't ever done that. He stated that he has pinched her butt before and one time when she hugged him (she's always hugging him), he said to her, "I oughtta pinch your little butt." [S.J.] said OK and he did. He stated that this happened maybe twice. . . . When asked if he had ever made comments about her underwear he stated that he had; things like, "you've got pretty blue panties on today." . . . When asked if he had ever told her that he would like to see her naked, he replied that he had once told her that if he had the money, he would give it to her to get those clothes from Victoria's Secret because "she would be a work of art." Mr. West stated that [S.J.] often hugs him and rubs her breasts on his shoulder and that she has sat in his lap before, but that he never touched her privates.
>
> Mr. West reported that he has never touched [S.J.] inappropriately, but then stated that on Thursday when he was touching her, she told him that he needed to stop because she didn't like it. He told her that he would stop. When asked specifically if he had made a comment about wanting to see her naked before he died, Mr. West stated that if [S.J.] said that he said it then he might have, but he didn't really remember. Det. Meadows stated to Mr. West

> that everything [S.J.] had told him, Mr. West was admitting to, except touching her chest. He agreed that he had done all of the stuff that he said, but remained sure that he didn't touch her breasts.

The hearing record also included a statement prepared by Detective Meadows regarding his interview with West:

> I spoke to the suspect on 4-2-02. . . . Jami[] Robinson observed. The suspect stated he didn't know where this was coming from. He did say that on the way home he would sometimes grab her leg and squeeze it and demonstrated and it was fairly high on the leg a couple inches away from the vagina area. He states that he has hugged her and one time he said "I feel like squeezing your little buns" and that the victim said "go ahead I would like that." He says this has happened a couple times. He states that he has made comments about her underwear when he saw it out of her pants by saying "you have pretty underwear on today" and he did tell her once that if he had lots of money he would take her to Victoria Secrets and let her buy everything because she would be a work of art. He says he has done these things but has no sexual intentions when he does it, that he is just playing with her and teasing her. He says that last Thursday she told him not to grab her leg anymore and he said ok.

Robinson was the only witness to testify on behalf of the local department at the March 27, 2003 hearing. In addition to reiterating much of the information contained in her written accounts of the interviews with S.J. and West, Robinson testified that S.J. stated during her interview that West helped her mother by driving S.J. and her six-year-old sister to and from school. According to Robinson, S.J. further stated that she had a close relationship with West and that, when West did something that made her uncomfortable, she would tell him to stop and he would, "but then it would happen again." Robinson also testified that S.J. stated it made her uncomfortable when West talked about and grabbed her underwear. Robinson further testified that she felt S.J.'s statements were reliable and that S.J. felt bad about getting West in trouble.

Robinson also testified that the interviews with S.J. and West constituted the full extent of her investigation and that the founded disposition she issued was based solely on S.J.'s statement and West's admissions "about what he had done."

When asked why the interview with S.J. was not tape recorded, Robinson explained that, during joint investigations with the police, "the team leader who is the police department in this case is the person that decides whether or not there will be a tape recorder needed. The police do not tape [victim] interviews, so I did not tape it."

On cross-examination, the following exchange between West's counsel and Robinson took place:

> [WEST'S COUNSEL]: Right, so it's an instance where [S.J.'s] in the passenger seat, [West's] in the driver seat and he reaches over and grabs her leg.
>
> MS. ROBINSON: Correct.
>
> [WEST'S COUNSEL]: Okay. And did anybody ask her if that was kind of an affectionate thing that he had done many times in the past?
>
> MS. ROBINSON: I don't know that those words were used, but she said that it made her uncomfortable and she had to remove his hands so I interpreted that as she didn't like it.
>
> [WEST'S COUNSEL]: Okay. What instance was she talking about when she became uncomfortable about?
>
> MS. ROBINSON: When he would grab her high up on her leg and brush her genitals from time to time.
>
> [WEST'S COUNSEL]: But wasn't it this time just before the report [of abuse] that she finally said I don't like it for you to do that?
>
> MS. ROBINSON: That's when she finally said that. Yes.
>
> [WEST'S COUNSEL]: Okay. And as soon as she said that didn't she say that he took his hand away? As soon as she said I don't like it when you do that. Didn't she also say that he took his hand away?
>
> MS. ROBINSON: Yes.
>
> [WEST'S COUNSEL]: Okay. And actually in the interview with Mr. West, he told you about that too. . . .

MS. ROBINSON: Right.

[WEST'S COUNSEL]: He said that as soon as she said anything to him that made her uncomfortable he said, okay I won't do it anymore. And that was the last time he saw her when that interchange occurred. Is that –

MS. ROBINSON: That's my understanding. Yes.

Robinson also testified on cross-examination that, prior to the March 29, 2002 interview with S.J., no discussion was held about whether the interview should be tape recorded. Robinson further testified that, in demonstrating during his interview how he grabbed S.J.'s leg in the car, West's hand was "midway up" the leg. Robinson described the relationship between S.J. and West as "affectionate" and testified that "it was common for the two of them to hug." Robinson further testified that, in responding to a general question about other things West may have done that made her uncomfortable, S.J. did not reveal the temporal or circumstantial context in which West's comments to S.J. about her underwear, his wanting to see her naked before he died, and her being pretty like the girls in the magazines were made.

Testifying on his own behalf at the March 27, 2003 hearing, West denied ever putting his hand on S.J.'s "thigh up close to her genitals." He admitted that he had touched S.J.'s leg near the knee and her face while driving. He insisted, however, that the touching was strictly playful and friendly and that he never had "any sexual feelings or intents with regard to [S.J.]." He further admitted that the subject of Victoria's Secret had come up in a conversation with S.J. but denied telling her that he would buy her any clothes from there. He and S.J., he explained, were merely discussing the modeling classes she was taking at the time and talking about the "different magazines with modeling" in them that she said her mother had. West also admitted having had a discussion with S.J. about her underwear once when "she was wearing low-riding pants." He told her, he explained, that her father, who often disliked the way she dressed, would not "be too happy" that she was wearing her "little underwear." West also testified that the only

time S.J. asked him to stop touching her was the last time he saw her. They were "kidding around," he explained, and he reached over and "hit her on the leg." She said she wished he "wouldn't do that anymore," and he said, "Okay. No problem."

West's daughter, Donna West Knight, testified that West and S.J. had a close, affectionate, grandfather-granddaughter-type relationship. Knight stated that S.J. called West "grandpa" and would frequently "call up and just talk to [West] about what was going on in her life or even ask if . . . she could come over and talk to him" and his wife or go out to lunch with them. According to Knight, S.J. was "a very affectionate girl" who "liked to hug" West. Knight observed that S.J. initiated the hugs and never "seemed to feel uncomfortable around" West, even in the weeks immediately preceding the local department's receipt of the sexual abuse complaint against West.

On June 2, 2003, the administrative hearing officer issued an extensive written decision concluding, *inter alia*, that the local department's procedural violations were not fatal to the founded disposition and the evidence supported the founded disposition of sexual abuse, but did not establish that S.J. suffered "serious harm" as a result of the abuse, as required for a level one disposition. Accordingly, the hearing officer reduced the founded disposition to sexual abuse, level two.[2] In determining that the evidence supported the founded disposition of sexual abuse, the hearing officer specifically found that, given the many similarities between S.J.'s statement and West's statement, it was "more likely than not that [S.J. was] telling the truth about what happened in [West's] car" and that, "[w]hen West touched S.J.'s genital area, breasts and buttocks, he did so intentionally and with the intent of providing himself sexual gratification."

[2] The consequences of a level two finding are less severe than a level one finding, in that, among other things, a level two finding requires that the abuser's name be retained by the central registry for seven years, whereas a level one finding requires retention for eighteen years. See 22 VAC 40-700-30.

The hearing officer also noted that, although West did not appear physically capable of lifting S.J. "into the air by her buttocks," S.J. "described other touching and pinching of her buttocks, which . . . fits the policy description of 'Sexual Molestation.'"

West appealed the hearing officer's decision to the circuit court. As before, he sought reversal of the founded disposition on the grounds that the evidence failed to support a finding of sexual abuse and the local department's procedural violations rendered the founded disposition invalid. West also requested reasonable attorney's fees and costs. Upon reviewing the case, the court determined that, despite revealing "disagreement over certain factual details" and "what inferences are supported by the facts," the record contained "more than ample evidence to affirm the [hearing officer's] findings of fact." The court further determined, however, that, in failing to record the interview with S.J. in deference to the police department's "blanket policy of not tape recording interviews with alleged victims," in failing to conduct a face-to-face interview with West, and in failing to advise West of his right to tape record his interview with Detective Meadows, the local department failed to "observe applicable mandates of the Virginia Administrative Code." Those collective failures to comply with required procedure, the court concluded, "could have had a significant impact on the ultimate decision to classify the allegation against . . . West as a founded complaint" and, thus, were "not mere harmless error." Observing that the local department's procedural violations were "such that new proceedings on remand [could not] cure the procedural deficiencies of the agency's investigation," the circuit court set aside the founded disposition and ordered that the complaint against West be dismissed. The court then denied West's request for attorney's fees and costs, finding them unwarranted under the circumstances of this case.

This appeal by the Commissioner and cross-appeal by West followed.

II. PROCEDURAL ERRORS

A. Failure to Tape Record the Alleged Victim's Interview

The Commissioner contends that Robinson, the local department's child protective services investigator in this case, properly declined to tape record the interview with S.J. because the local department and the police department conducted a joint investigation of the complaint against West, and the team leader, Detective Meadows, determined that tape recording the interview with S.J. was "inappropriate." Thus, the Commissioner argues, the exception set forth in 22 VAC 40-705-80(B)(1)(d) applies and the local department was not required to tape record the interview. Consequently, the Commissioner concludes, the circuit court erred in ruling that the local department's decision not to tape record the interview with S.J. constituted a procedural violation. We disagree.

Judicial review of a child protective services founded disposition of child abuse is governed by the Administrative Process Act (APA), codified at Code §§ 2.2-4000 to 2.2-4033. See Code § 63.2-1526(B). Accordingly, "the burden is upon the appealing party to demonstrate error." Carter v. Gordon, 28 Va. App. 133, 141, 502 S.E.2d 697, 700-01 (1998); Code § 2.2-4027. The reviewing court will view "the facts in the light most favorable to sustaining the [agency's] action," Atkinson v. Virginia Alcohol Beverage Control Comm'n, 1 Va. App. 172, 176, 336 S.E.2d 527, 530 (1985), and "take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted," Code § 2.2-4027. Moreover, the review of an agency's factual findings "is limited to determining whether substantial evidence in the agency record supports its decision," Avante at Lynchburg, Inc. v. Teefey, 28 Va. App. 156, 160, 502 S.E.2d 708, 710 (1998), and "great deference is to be accorded the agency decision," Holtzman Oil v. Commonwealth, 32 Va. App. 532, 539, 529 S.E.2d 333, 337 (2000). However, "'[i]f the issue falls outside the area generally entrusted to the

agency, and is one in which the courts have a special competence, . . . there is little reason for the judiciary to defer to an administrative interpretation.'" Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 243-44, 369 S.E.2d 1, 8 (1988) (quoting Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 914-15 (3d Cir. 1981)). Hence, where, as here, "the legal issues require a determination by the reviewing court whether an agency has . . . failed to observe required procedures, less deference is required and the reviewing courts should not abdicate their judicial function and merely rubber-stamp an agency determination." Id. at 243, 369 S.E.2d at 7-8.

DSS's regulation 22 VAC 40-705-80(B)(1) provides, in pertinent part, as follows:

> The child protective services worker shall conduct a face-to-face interview with and observation of the alleged victim child. All interviews with alleged victim children must be audio tape recorded except when the child protective services worker determines that:
>
> a. The child's safety may be endangered by audio taping;
>
> b. The age and/or developmental capacity of the child makes audio taping impractical;
>
> c. A child refuses to participate in the interview if audio taping occurs; or
>
> d. In the context of a team investigation with law-enforcement personnel, the team or team leader determines that audio taping is not appropriate.
>
> . . . A child protective services worker shall document in detail in the record and discuss with supervisory personnel the basis for a decision not to audio tape record an interview with the alleged victim child.

As the circuit court pointed out in its ruling, the Commissioner, in arguing that Robinson was excused under 22 VAC 40-705-80(B)(1)(d) from having to tape record the interview with S.J., disregards the express mandate of the regulation that the child protective services worker must "document *in detail* in the record and discuss with supervisory personnel the basis for a decision not to audio tape record an interview with the alleged victim child." 22 VAC

40-705-80(B)(1) (emphasis added). That mandate makes it clear that not only must the child protective services investigator determine in each instance whether extenuating circumstances exist that make the recording of the interview impractical or inappropriate under the standards of 22 VAC 40-705-80(B)(1), the investigator must also, in each instance where the interview is not recorded, reference and articulate specific evidence and findings based on that evidence that support the conclusion that tape recording the alleged victim's interview was impractical or inappropriate. It is not enough, therefore, in deciding not to tape record the alleged victim's interview under 22 VAC 40-705-80(B)(1), to merely state in conclusory fashion, or rely on a team or team leader's conclusory statement, that recording the interview is impractical or inappropriate. There must be evidence specifically relating to the alleged victim that supports the determination that recording the interview is impractical or inappropriate. If no such evidence exists, the decision not to tape record the interview is invalid and the failure to record the interview is a violation of required procedure. See Johnston-Willis, Ltd., 6 Va. App. at 244, 369 S.E.2d at 8 (holding that "'"judicial interference is permissible . . . for relief against the arbitrary or capricious action that constitutes a clear abuse of the [administrative agency's] delegated discretion"'" (quoting Va. Alcoholic Beverage Control Comm'n v. York Street Inn, Inc., 220 Va. 310, 315, 257 S.E.2d 851, 855 (1979) (quoting Schmidt v. Bd. of Adjustment of the City of Newark, 88 A.2d 607, 616 (N.J. 1952)))).

In this case, the reason given in the local department's investigative record for not taping the interview with S.J. is that the team leader deemed it "inappropriate." No basis for that characterization is provided in the investigative record, however. Robinson testified at the evidentiary hearing that, prior to the interview with S.J., no discussion was held with either Detective Meadows, the team leader of the joint investigation, or her supervisory personnel about whether the interview should be tape recorded. Robinson explained that she did not tape record the interview with S.J. solely because the police department was always the team leader in

joint investigations with the police and, since "[t]he police do not tape [victim] interviews," she did not tape the interview. No other reason for not taping the interview was offered, and none is evident in the record.

It is clear, therefore, that Robinson's interview with S.J. was not tape recorded simply because it was the local department's policy to automatically defer in joint investigations with the police to the police department's blanket policy of not recording interviews with complaining witnesses. We agree with the circuit court that the local department's blind adherence in this case to the police department's blanket policy of never recording such interviews does not, by itself, support the conclusion that tape recording the interview with S.J. was inappropriate under 22 VAC 40-705-80(B)(1)(d). Because there was no specific determination made that tape recording the interview with S.J. was either impractical or inappropriate under 22 VAC 40-705-80(B)(1), and because Robinson knew of no evidence specifically related to S.J. indicating that tape recording the interview was either impractical or inappropriate and the record reveals no such evidence, we conclude, as a matter of law, that the local department's decision not to tape record the interview is invalid.

Accordingly, we agree with the circuit court that the local department's failure to tape record the interview with S.J. constituted a violation of the regulatory procedure required by 22 VAC 40-705-80(B)(1).

B. Harmless Error Claim

As discussed above, the local department failed to tape record Robinson's interview with S.J., in violation of 22 VAC 40-705-80(B)(1). Additionally, the Commissioner does not challenge, on appeal, the circuit court's determination that the local department failed to conduct a face-to-face interview with West, in violation of 22 VAC 40-705-80(B)(2), and failed to advise, or have Detective Meadows advise, West of his right to tape record his interview with

Meadows, in violation of 22 VAC 40-705-80(B)(2)(a). Instead, the Commissioner contends, in reliance on a reversible-error standard applied by this Court in Johnston-Willis, Ltd., 6 Va. App. at 258, 369 S.E.2d at 16, that all of these procedural violations by the local department were mere harmless error because West did not demonstrate that he was prejudiced by the violations or that "a contrary result would have been reached" had the violations not occurred. Thus, the Commissioner concludes, the circuit court erred in ruling that the local department's failure to observe required procedure was not mere harmless error and in setting aside the hearing officer's founded disposition of sexual abuse against West on that basis. We disagree.

In an appellate review of a hearing officer's decision, the burden is on the "party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: . . . observance of required procedure where any failure therein is not mere harmless error." Code § 2.2-4027. Accordingly, a party seeking relief from a founded disposition of abuse on grounds that the local department failed to comply with required procedure "must demonstrate such failure was not mere harmless error." J.B. v. Brunty, 21 Va. App. 300, 305, 464 S.E.2d 166, 169 (1995). If the party seeking relief satisfies that burden, the reviewing court "shall suspend or set [the case decision] aside." Code § 2.2-4029.

Although what constitutes "mere harmless error" under the Administrative Process Act is not amenable to precise definition and inevitably requires a case-by-case analysis, see, e.g., Ford Motor Co. v. Courtesy Motors, Inc., 237 Va. 187, 190-91, 375 S.E.2d 362, 364 (1989) (applying three different analyses in concluding that the agency's failure to comply with required procedure constituted mere harmless error), it is clear that procedural violations that "could have had a significant impact on the ultimate decision so as to undermine the 'substantiality of the evidential

support' for the factual findings" are not mere harmless error, Virginia Board of Medicine v. Fetta, 244 Va. 276, 283, 421 S.E.2d 410, 414 (1992).[3] Such is the case here.

Guidelines promulgated to help "the local departments of social services throughout the Commonwealth in interpreting the definitions of abuse and neglect provided by statute" are contained in DSS's Child Protective Services Policy Manual, see Jackson v. W., 14 Va. App. 391, 399, 419 S.E.2d 385, 389 (1992), as well as in the Virginia Administrative Code, see 22 VAC 40-705-30. The Administrative Code defines "sexual abuse" as "any act of sexual exploitation or any sexual act upon a child in violation of the law which is committed or allowed to be committed by the child's parents or other persons responsible for the care of the child pursuant to [Code] § 63.2-100." 22 VAC 40-705-30(E). The hearing officer noted that, according to Volume VII, Section 3, Chapter A of DSS's Child Protective Services Policy Manual, the definition of "sexual abuse" encompasses "sexual molestation," which is "'an act committed with the intent to sexually molest, arouse or gratify any person, including where . . . [t]he caretaker intentionally touches the child's intimate parts or clothing directly covering such intimate parts,'" which include the "'genitalia, anus, groin, breast, or buttocks of any person.'" See also Code § 18.2-67.10 (providing a similar definition of "sexual abuse").

[3] In adopting this standard for use in this case to determine whether, or not, the local department's procedural violations were "mere harmless error," we specifically reject as inapplicable that portion of the harmless-error standard urged on us by the Commissioner that would require West to prove that "a contrary result would have been reached" absent the procedural violations. Johnston-Willis, Ltd., 6 Va. App. at 258, 369 S.E.2d at 16. As indicated in Johnston-Willis, Ltd., the application of that standard is limited to those circumstances where the administrative hearing officer has improperly "considered evidence not in the record": "'No reversible error will be found . . . unless there is a clear showing of prejudice arising from the admission of *such evidence*, or unless it is plain that the agency's conclusions were determined by *the improper evidence*, and that a contrary result would have been reached in *its* absence.'" Id. (quoting Va. Real Estate Comm'n v. Bias, 226 Va. 264, 270, 308 S.E.2d 123, 126 (1983)) (emphasis added). None of the procedural errors at issue in this case involved the consideration of extra-record evidence.

The gravamen of the sexual abuse complaint against West was that, when West reached over to touch S.J. in the passenger seat of the car, his hand sometimes "brush[ed]" her genitals over her clothes and the upper part of her breasts and that West touched her buttocks over her clothes while hugging her on three occasions. West admitted at the evidentiary hearing that, in the context of the close relationship he had with the child, he had touched S.J.'s leg near the knee and her face while driving and that he had hugged her, but he denied that he had ever touched her inappropriately. He insisted that the touching was strictly playful and friendly and that he never had "any sexual feelings or intents with regard to [S.J.]." He further argued that, if he did touch S.J.'s intimate parts or the clothing over her intimate parts, it was purely incidental and inadvertent. He also argued that the child protective services investigator took out of context and gave an unintended sexual bent to several remarks he made to S.J. that, given the grandfather-granddaughter-type relationship he had with her, were entirely innocent. Thus, West asserted, the local department's indirect evidence regarding S.J.'s and his interview statements did not show that he touched S.J. with the requisite intent. Considering the totality of the circumstances, the hearing officer found that West "intentionally" touched S.J.'s breasts and the clothing directly covering S.J.'s genital area and buttocks, and did so "with the intent of providing himself sexual gratification."

While it is clear that, as the circuit court determined, the evidence in the record, when viewed in the light most favorable to sustaining the agency's action, is sufficient to support the hearing officer's decision, it is equally clear that, at the time the hearing officer made that decision, "the factual issues were very much in dispute," particularly with regard to the nature of West's touching and his intent relative to that touching. Fetta, 244 Va. at 283, 421 S.E.2d at 414. The question before us, then, is whether any of the procedural violations committed by the local department during its investigation of the sexual abuse complaint against West "could have had a

significant impact on the ultimate decision so as to undermine the 'substantiality of the evidential support' for the factual findings." Id. Upon reviewing the record, we conclude that, under the circumstances of this case, the local department's failure to tape record S.J.'s interview very well could have.

The absence of a tape recording of S.J.'s interview is particularly critical in this case because, given the close, grandfather-granddaughter-type relationship West and S.J. had, the meaning and import of S.J.'s statements about West touching her genitals, breasts, and buttocks were susceptible to more than one plausible interpretation and necessarily turned on the subtle nuances of those statements and the conduct they described. Indeed, slight nuances in the inflection or context of the words spoken by S.J. could substantially change the meaning of statements that directly impacted the question of whether West had the requisite intent. West could not depose S.J. or call her as a witness at the administrative hearing, see Code § 63.2-1526(B), and yet the evidence regarding S.J.'s statements provided the basis for the hearing officer's finding of sexual abuse. It was essential, therefore, for the hearing officer to have access to the precise substance of S.J.'s statements.

Nevertheless, the only evidence the hearing officer had before her regarding what S.J. was asked during the interview, what she said, and how she said it was limited to the child protective services investigator's indirect evidence, based on her recall and interpretation, of what was said at the interview. Because there was no opportunity to listen to the questions posed to S.J., the manner in which the child responded, or, indeed, the responses themselves, the hearing officer was left to rely on the inferences drawn by Robinson and her interpretive conclusion that West's touching was intentional and for the purpose of sexual gratification. However, unlike Robinson's written account of the interview in the investigative record and her mostly verbatim testimony from that account, an audiotape of S.J.'s interview would have revealed the actual language used by S.J.,

as well as the tone, pauses, certainties, and other nuances of the child's statements. The ability to hear the actual interview could well have led the hearing officer to draw different inferences from S.J.'s statements and to conclude that it was at least as likely as not that West did not intentionally touch S.J.'s intimate parts or material directly covering such parts with the intent to sexually molest, arouse, or gratify. Indeed, although it is clear from the evidence that S.J. was discomforted by West's touching, it is not at all clear, particularly in light of the affectionate relationship she and West had, that S.J. believed that West "brush[ed]" her intimate parts intentionally. Nor is it clear, as a matter of law, from her reported version of what occurred that any of West's touching was for a sexual purpose. Given the child's age, it is entirely possible, as West suggests, that she simply began to feel that the innocent, friendly touching she once appreciated as a child was now embarrassing and unwelcome as an adolescent.

The need for a tape recording of S.J.'s interview is further borne out in this case by the ambiguity in Robinson's accounts of S.J.'s statements regarding the frequency and timing of S.J.'s protestations to West about his touching her. In her written account, Robinson reported that S.J. said West's touching her "high up on her leg" and her telling him "to stop, that she didn't like it" were a daily occurrence. Robinson also testified at the administrative hearing that, when West's touching made S.J. uncomfortable, S.J. would tell him to stop and he would, "but then it would happen again." However, Robinson later testified on cross-examination that S.J. only "finally" told West that she did not like his touching her just before the complaint of sexual abuse was made against West. Although plainly not dispositive in and of itself, this discrepancy tended to undermine the reliability of Robinson's secondhand version of S.J.'s statements, particularly in a case like this where nuance was critical. Without a tape recording of the interview, that reliability could not be assured by the hearing officer. Cf. 22 VAC 40-705-190(H)(12) (providing that, although not "bound by the strict rules of evidence," the hearing officer may "only consider that

evidence, presented by either party, which is substantially credible or reliable"). Likewise, the local department's failure to tape record the interview with S.J. left West with no meaningful recourse against any possible misapprehension or misinterpretation of S.J.'s statements by Robinson.

We hold, therefore, that the local department's failure to tape record the interview with S.J. "could have had a significant impact on the ultimate decision so as to undermine the 'substantiality of the evidential support' for the factual findings." Fetta, 244 Va. at 283, 421 S.E.2d at 414. Accordingly, that violation was not mere harmless error, id., and the founded disposition of sexual abuse must be set aside, Code § 2.2-4029.[4]

C. Lack of Remand for Further Adjudication

The Commissioner contends, that having set aside the founded disposition of sexual abuse based on the local department's failure to comply with required procedure in the investigation of the complaint against West, the circuit court was required under Code § 2.2-4029 to remand the case to the hearing officer for further adjudication and correction of that procedural failure. Thus, the Commissioner concludes, the circuit court erred in failing to remand the case to the hearing officer to allow the local department to cure its failure to comply with required procedure. We disagree.

Code § 2.2-4029 provides, in pertinent part, that, "[w]here a . . . case decision is found by the court not to be in accordance with law under [Code] § 2.2-4027, the court shall suspend or set it aside and *remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law*." (Emphasis added.) As the Supreme Court observed in Fetta, the statute explicitly grants the circuit court "the discretion to specify exactly what shall be done on remand." 244 Va. at 280, 421 S.E.2d at 412. Hence, the Court further observed, "the clear statutory

[4] Having concluded that the local department's failure to tape record its interview with S.J. was not mere harmless error and required the setting aside of the founded disposition of sexual abuse, we need not consider the other procedural errors addressed by the circuit court.

language contemplates that the circuit court may order a new hearing upon remand or, as here, may order dismissal of the charges, resulting in no further hearing at all." Id.

Thus, as in Fetta, the dispositive issue now before us "simply is whether the circuit court abused its judicial discretion in refusing to order a new hearing of the same charges and in ordering the proceeding dismissed." Id. In Fetta, the Court concluded that the circuit court did not abuse its discretion because a rehearing on remand could not undo the harm done by the agency's flawed procedure to "the fact-finding process." Id. Likewise, the harm done in this case to the fact-finding process by the local department's failure to tape record the interview with the alleged child victim cannot be corrected by a rehearing on remand. The clock cannot be turned back. Obviously, the same interview with S.J. cannot now be tape recorded. Moreover, under the circumstances of this case, any interview now conducted and tape recorded on remand would plainly be tainted by the passage of time. As we previously noted, given the close, affectionate relationship that existed between West and S.J. at the time the touching at issue occurred, the dispositive factual determination whether, in touching S.J., West had the requisite intent turned less on the basic facts of the case than on the subtle evidentiary nuances of the statements given by S.J. on March 29, 2002, regarding incidents that had occurred as recently as the day before. The passage of more than three years has clearly made the recapturing of such ephemeral nuances impossible. Cf. Toussie v. United States, 397 U.S. 112, 114 (1970) (noting the usefulness of statutes of limitations in criminal cases because even "basic facts may . . . become obscured by the passage of time" and intervening factors).

Hence, we cannot say that the circuit court abused its discretion in refusing to remand the case to the hearing officer for a new hearing and in ordering the dismissal of the complaint against West.

III. ATTORNEY'S FEES AND COSTS

West contends, on cross-appeal, that, having ruled in his favor, the circuit court erred in failing to award him his attorney's fees and costs. He also requests an award of attorney's fees and costs incurred in defending this appeal.

Code § 2.2-4030(A) provides, in pertinent part, that a person contesting an agency decision "shall be entitled to recover from that agency . . . reasonable costs and attorneys' fees if such person substantially prevails on the merits of the case and the agency's position is not substantially justified." Although West prevailed in the circuit court and prevails again in this Court, we conclude that the Commissioner's position in this case was "substantially justified." As previously mentioned, there was ample evidence to support the hearing officer's decision. Moreover, the Commissioner's position that the local department's decision not to tape record its interview with the alleged child victim did not constitute a procedural violation was "substantially plausible and was based on the [local department's] long-standing practice," under 22 VAC 40-705-80(B)(1)(d), of deferring to the police department's procedural policy when conducting a joint investigation, a practice which, prior to the instant appeals, "had never been [fully] tested in court." Motor Vehicle Dealer Bd. v. Morgan, 38 Va. App. 665, 672, 568 S.E.2d 378, 381 (2002). Thus, although wrong, the Commissioner's position was not unreasonable.

We hold, therefore, that West is not entitled to an award of attorney's fees and costs incurred in the circuit court or in this Court, under Code § 2.2-4030(A).

IV. CONCLUSION

For these reasons, we affirm the circuit court's judgment in deciding that the local department's failure to tape record its interview with the alleged victim constituted a procedural violation and was not mere harmless error, in ordering the dismissal of the complaint against West rather than remanding the case to the hearing officer for further adjudication, and in

denying West's request for attorney's fees and costs. Accordingly, we remand this case to the circuit court for remand to the Commissioner with instructions to dismiss the complaint of sexual abuse against West.

Affirmed.

McClanahan, J., concurring, in part, and dissenting, in part.

I concur with the majority with regard to its decision in Parts II A and III. I dissent with regard to Part II B, because I believe substantial evidence supports the agency's decision and West did not prove that the procedural violations were not mere harmless error. Thus, I need not address Part II C.

The Administrative Process Act, Code § 2.2-4000 *et seq.*, provides that "the duty of the court with respect to issues of fact shall be limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did." Code § 2.2-4027; see Vasaio v. DMV, 42 Va. App. 190, 196, 590 S.E.2d 596, 599 (2004); J.P. v. Carter, 24 Va. App. 707, 720 n.5, 485 S.E.2d 162, 169 n.5 (1997). As such, "the circuit court's role in an appeal from an agency decision is equivalent to an appellate court's role in an appeal from a trial court." Sch. Bd. v. Nicely, 12 Va. App. 1051, 1062, 408 S.E.2d 545, 551 (1991). We have authority to "reject agency factfinding 'only if, considering the record as a whole, a reasonable mind would *necessarily* come to a different conclusion.'" Citland, Ltd. v. Commonwealth, 45 Va. App. 268, 274-75, 610 S.E.2d 321, 324 (2005) (quoting Mattaponi Indian Tribe v. Commonwealth, 43 Va. App. 690, 706, 601 S.E.2d 667, 675 (2004)) (emphasis in original). "This standard is designed 'to give great stability and finality to the fact-finding process of the administrative agency.'" Atkinson v. Virginia ABC Comm'n, 1 Va. App. 172, 176, 336 S.E.2d 527, 530 (1985) (quoting Virginia Real Estate Comm'n v. Bias, 226 Va. 264, 269, 308 S.E.2d 123, 125 (1983)).

At the administrative hearing, the evidence showed that when Detective Meadows told West that it seemed he was admitting to everything the child said, except for touching her breast area, West replied that was correct. The hearing officer found that West's and S.J.'s statements were "so similar as to be almost identical," that the evidence supported the allegations, and that

the procedural violations were not fatal to the disposition. The trial court repeatedly stated that it had "concluded there was 'ample' evidence on which to base the agency's findings of fact." Its initial opinion letter read:

> While the record in this case reveals disagreement over certain factual details – and, more particularly, over what inferences are supported by the facts – it cannot be characterized as lacking substantial evidential support for the agency's decision. To the contrary, the record includes more than ample evidence to affirm the agency's findings of fact. In short, the record establishes no substantive ground on which the agency's decision should be disturbed.

The court further stated that "West did not prevail on the substantive question in the case," which was whether he had engaged in the sexual abuse of S.J. The trial court found the evidence to be "substantial" and "ample." It then affirmed the agency's disposition of "Founded – Sexual Abuse (Sexual Molestation) – Level Two" against West, leaving no question about whether the evidence supported the result the agency reached.

It is also clear that the local department failed to abide by its own procedures and the provisions of the Virginia Administrative Code. I agree with the trial court and with the majority that those failures constituted procedural error. I do not agree that the procedural error results in dismissal of the case. The majority concludes that because, "[i]t was essential . . . for the hearing officer to have access to the precise substance of S.J.'s statements," the case should be dismissed for lack of tape recording. In fact, there are four exceptions to the rule requiring a tape recording. One of those exceptions, DSS regulation 22 VAC 40-705-80(B)(1)(d), permits no tape recording if, "[i]n the context of a team investigation with law-enforcement personnel, the team or team leader determines that audio taping is not appropriate" – exactly the situation in this case. If the interview is not tape recorded, the CPS worker must document the basis for the decision not to tape. Thus, the error in this case was not that there was a failure to tape record, but that the CPS worker did not document the basis for the decision not to tape.

The majority concludes that tape recording the child's statement was "essential," and, without it, the accused cannot get a fair hearing, because the trier of fact "cannot reliably serve its function." See Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (citing Rose v. Clark, 478 U.S. 570, 577-78 (1986)). Such a ruling improperly elevates the error to the level of a structural error. "[A] structural error is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" Emmett v. Warden, 269 Va. 164, 168, 609 S.E.2d 602, 605 (2005) (quoting Fulminante, 499 U.S. at 310).

> Examples of errors which affect the framework of a trial include the denial of a public trial, the denial of counsel, the denial of an impartial trial judge[,] . . . the infringement upon a defendant's right to represent himself, and the improper instruction to a jury as to reasonable doubt and the burden of proof.

Morrisette v. Warden, ___ Va. ___, ___, 613 S.E.2d 551, 556 (2005); see also Johnson v. United States, 520 U.S. 461, 466-67 (1997). The United States Supreme Court has held that such structural errors defy harmless error analysis because they undermine the proceeding's fairness as a whole. Fulminante, 499 U.S. at 309-10.

The error in this case is not structural, and therefore, *is* subject to harmless error analysis. See generally, Johnson, 520 U.S. at 468-69. Non-structural errors are amenable to harmless error analysis because they "'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" Sanchez v. Commonwealth, 41 Va. App. 340, 352, 585 S.E.2d 337, 343 (2003) (quoting Brecht v. Abrahamson, 507 U.S. 619, 629 (1993)). Such errors do not "'infect the entire trial process.'" Id. at 352 n.4, 585 S.E.2d at 343 n.4 (citing Tuggle v. Netherland, 79 F.3d 1386, 1391 (4th Cir. 1996)). Even if you ignore the four exceptions to the tape recording requirement, the error in this case does not fit in that limited class of structural errors. The statute itself dictates that the harmless error standard applies to this specific kind of error, designates the party which has the burden of proof, and

explains how the standard is applied, giving the error the presumption of harmlessness. Code § 2.2-4027.

The trial court and the majority analyze this procedural, non-structural, error using the wrong standard. The majority improperly relies on Virginia Bd. of Medicine v. Fetta, 244 Va. 276, 421 S.E.2d 410 (1992), for its standard on whether such failure was harmless error. However, Fetta is a structural error case. Fetta attacked the impartiality of the fact finder. The Court specifically stated that the "mere harmless error" standard did not even apply in Fetta, because outside influence on the fact finder "could have had a significant impact on the ultimate decision so as to undermine the 'substantiality of the evidential support' for the factual findings." Id. at 283, 421 S.E.2d at 414.

The trial court also placed the burden of proof on the wrong party in its harmless error analysis. The court's letter opinion reflects that it placed the burden on the Commissioner and not on West. Code § 2.2-4027 states that the burden is "upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: . . . observance of required procedure where any failure therein is not mere harmless error." Consequently, it is West's burden to prove that the agency's failure to detail its reasons for not tape recording the victim's statement was not mere harmless error.[5] West has the burden to show prejudice. "'[T]he burden of showing that prejudice has resulted' is on the party

[5] See J.B. v. Brunty, 21 Va. App. 300, 305, 464 S.E.2d 166, 169 (1995) ("Code § 9-6.14:17(iii) [recodified as Code § 2.2-4027] states the party seeking review of required agency procedure must demonstrate such failure was not mere harmless error."); Comm. of Concerned Citizens for Prop. Rights v. Chesapeake Bay Local Assistance Bd., 15 Va. App. 664, 669, 426 S.E.2d 499, 502 (1993) ("[T]he Committee [the party complaining of the agency action] has the burden to demonstrate an error of law, such as the Board's failure to observe required procedure, *and* to show that such error is not harmless." (emphasis added)).

claiming injury from the erroneous rulings."[6] Nat'l Labor Relations Bd. v. Seine and Line Fisherman's Union of San Pedro, 374 F.2d 974, 981 (9th Cir. 1967) (quoting Palmer v. Hoffman, 318 U.S. 109, 116 (1943)).

The trial court's letter opinion, however, is erroneously replete with references to the Commissioner's failure to explain the agency's mistakes and prove its case, while it makes no reference to West's demonstration of how he was prejudiced.[7] The court held that, "considered as a whole," the procedural violations "*could* have had a significant impact on the ultimate decision." (Emphasis added). The statute does not allow prejudice to be presumed. In fact, the presumption is that the error was harmless. Code § 2.2-4027; Envtl. Def. Fund v. Virginia State

[6] An appellant with the burden of proving that an error was not harmless is required to show that the verdict rendered was attributable to the error. See Sullivan v. Louisiana, 508 U.S. 275, 279 (1993); United States v. Lane, 474 U.S. 438, 449 (1986) (holding that "an error . . . [that] affects substantial rights . . . requires reversal only if the [error] results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict" (internal quotation marks and citation omitted)); Kotteakos v. United States, 328 U.S. 750, 765 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."); Clay v. Commonwealth, 262 Va. 253, 259-60, 546 S.E.2d 728, 731-32 (2001); Lavinder v. Commonwealth, 12 Va. App. 1003, 1006, 407 S.E.2d 910, 911 (1991) ("An error does not affect a verdict if a reviewing court can conclude, without usurping the [fact finder's] function, that, had the error not occurred, the verdict *would* have been the same." (emphasis added)); Code § 8.01-678; see also United States v. Olano, 507 U.S. 725, 734 (1993); Ctr. for Auto Safety v. Tiemann, 414 F. Supp. 215, 226 (D.D.C. 1976) ("[I]n claiming that agency action should be set aside for procedural irregularity . . ., it is plaintiffs' burden to show that prejudice has resulted."); Trifid Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1095 (D. Mo. 1998) ("[T]he burden to show that prejudice has resulted from procedural irregularity rests on the party claiming injury from the allegedly erroneous ruling."); Yosemite Tenants Ass'n v. Clark, 582 F. Supp. 1342, 1363 (D. Cal. 1984).

[7] "[T]he record indicates without elaboration"; "this is the position taken by the Commissioner"; "The Commissioner contends"; "The Commissioner's analysis fails"; "the Commissioner's only explanation"; "the explanation for this failure"; "The Commissioner takes the position that the various failures to observe required procedure . . . constitute harmless error. The Court does not agree." See Watson Bros. Transp. Co. v. United States, 180 F. Supp. 732, 740 (D. Neb. 1960) ("[P]laintiff was afforded the fullest opportunity to submit evidence sustaining its statutory burden of proof.").

Water Control Bd., 15 Va. App. 271, 277, 422 S.E.2d 608, 611 (1992) ("It is well established that agency action is presumed valid on review, and the burden rests 'upon the party complaining' to overcome this presumption." (citing Code § 9-6.14:17, recodified as Code § 2.2-4027)); see also Commonwealth ex rel. State Water Control Bd. v. Appalachian Power Co., 9 Va. App. 254, 259, 386 S.E.2d 633, 635 (1989), aff'd en banc, 12 Va. App. 73, 402 S.E.2d 703 (1991). West is required to demonstrate that the error had an actual prejudicial effect on the outcome. See Lane, 474 U.S. at 449. "If, when all is said and done, the conviction is sure that the error did not influence the [fact finder], or had but slight effect, the verdict and the judgment should stand." Clay v. Commonwealth, 262 Va. 253, 260, 546 S.E.2d 728, 731 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 764-65 (1946)).

As the trial court plainly stated in its second letter opinion (denying the motion to reconsider), even though it found the procedural violations *could* have made a difference, that does not mean that the outcome *would* have been any different. The court wrote,

> This is not to say the agency *would* otherwise have made a different decision, and does not equate to a finding that West did not commit the alleged acts of sexual abuse. As previously noted, the Court explicitly found that the agency had sufficient evidential support for its findings of fact. Considering all the circumstances of the case, there was substantial justification for the agency's position.

(Emphasis in original). It is hard to see how an explanation for why the interview was not tape recorded would have changed the hearing officer's determination, given the "substantial" and "ample" evidence in the record. The evidence shows that the hearing officer found West's statement and the child's statement were "so similar as to be almost identical." According to the hearing officer, "[the child]'s statement, as heard and noted by Ms. Robinson, was provided in its entirety to [West], and Ms. Robinson was subject to extensive cross-examination about it." This provided West an opportunity to demonstrate to the fact finder that the statement was unreliable,

not in context, or show that the credibility of the child was diminished.[8] He did not even make an attempt at such. Moreover, West testified in person at the administrative hearing, which provided him a full opportunity to correct his statement or explain any misunderstandings. On appeal, West conceded that even if he had been provided an opportunity to tape record his own interview, he would not have changed his statement.

West was required to demonstrate that the hearing officer's verdict was attributable to the agency's failure to comply with the procedural requirements. He has not done so. West has not demonstrated that he was prejudiced by the local department's failure to explain why S.J.'s interview was not tape recorded, conduct a face-to-face interview with him, or to offer a tape recording of his interview with the police. He has not even alleged that a contrary result would have been reached. There is no basis for concluding that the proper remedy in this case is dismissal, especially when the hearing officer and the trial court found that there is substantial

[8] The majority states:

> [t]he absence of a tape recording of S.J.'s interview is particularly critical in this case because, given the close, grandfather-granddaughter-type relationship West and S.J. had, the meaning and import of S.J.'s statements about West touching her genitals, breasts, and buttocks were susceptible to more than one plausible interpretation and necessarily turned on the subtle nuances of those statements and the conduct they described.

However, such an analysis fails to consider that (a) the regulations do not require a tape recording; (b) the hearing officer is the fact finder in this proceeding (not the trial court and not this Court); and, (c) hearsay evidence is admissible in proceedings under the APA.

"The rules of evidence are considerably relaxed . . ., and the findings of administrative agencies will not be reversed solely because evidence was received which would have been inadmissible in court." Bias, 226 Va. at 270, 308 S.E.2d at 126. It is well established that "hearsay evidence is admissible" at an administrative hearing conducted in accordance with the Administrative Process Act. See Carter v. Gordon, 28 Va. App. 133, 141, 502 S.E.2d 697, 701 (1998). "If the agency relies on hearsay evidence, the court reviewing the sufficiency of that evidence on appeal may give it the same weight as any other record evidence." Id.

evidence to support the findings of fact. Accordingly, I would reverse the trial court and affirm the decision of the hearing officer.